SUBJECT INDEX.

Page.

Statement of the case 1-40
How the entries came to be made..... 1-3
Entries made before Smith negotiated to purchase the lands 4-7
Nature of Krib's agency for Smith..... 3-4
The negotiations between Puter and Smith for the purchase of the lands... 7-17
The consideration paid by Smith..... 18
Smith taking deed from entrymen in name of Willd 17-18
Information to Commissioner of the General Land Office charging fraud in entries 18-19
Report to Commissioner by Special Agent Mathers 19
Reports to Commissioner by Special Agent Stratford 20-26
Report to Secretary of Interior by Special Inspector Green 26-29
Conveyance of lands to Werner 29
Mortgaging lands to First Trust and Savings Bank 29-30
Investigation by Heney and Burns in 1904-5 30
Incorporation of the Linn and Lane Timber Company 31
Conveyance of lands to that Company...31-33
Interest acquired by others than Smith in that Company 33-37
Suit started upon false information from

Puter 37
Suit commenced when 37-38
Pleas to original bill 38
Answers to amended bill 38
Amendment of bill to recover damages.. 39
Decision of Circuit Court 40
Decision of Court of Appeals 40
Specifications of Errors 41-51
Argument 51-147
What the courts below have decided in this case 51-54
I. The evidence of fraud in the entries not sufficient to justify decree vacating patents 55-70
II. The question of fraud in the entries conclusively decided by the Secretary of the Interior 70-74
III. Charles A. Smith a bona fide purchaser from the patentees 74-86
IV. The suit barred by the Act of March 3, 1891 87-147
A. As to the identity of Smith and the Linn and Lane Timber Co. 87
(a) The law under which the Company was organized 88-91
(b) What was done to organize the Company under the laws of Minnesota 92
(c) What business the Company transacted and what interest in it others than Smith acquired before the suit was commenced 93-99

(d) The law, generally, as to the separate entity of corporations 99-110
B. Was there any fraud in the organization of or the conveyance to the Company 110-116
C. As to the proper construction of the Statute (Act of March 3, 1891) 116-138
D. The Government had notice of the alleged fraud more than six years before the suit was brought 138-142
E. The Linn and Lane Timber Co. was an indispensable party 143
The Linn and Lane Timber Company did not hold subject to lis pendens..143-147

CASES CITED.

Page.

Adams v. Church, 193 U. S. 510..... 56
Aldrich v. Press Printing Co., 9 Minn. 123.... 90
Am. & Eng. Encyc. Law, Vol. 9, 155..... 95
Am. & Eng. Encyc. Law, Vol. 21, 650.....146
Amy v. Watertown, 22 Fed. 418.....133
Amy v. Watertown, 130 U. S. 320.....134
Atlantic, &c., Co. v. James, 94 U. S. 207..... 57
Bailey v. Glover, 21 Wall. 342.....117
Baker v. Woodward, 12 Ore. 3.....144
Baldwin v. Canfield, 26 Minn. 43..... 90
Bond v. Hopkins, 1 Schoales & Lefroy, 413...128
Brown, In re, 19 N. B. R. 312.....117
Chemical National Bank v. Kissane, 22 Fed. 429 135
Cholmondeley v. Clinton, 2 Jac. & Walk. 1.....128
Clarkson v. Morgan, 6 B. Mon. 441.....145
Colorado, &c., Co. v. United States, 123 U. S. 307 69
Cook on Corp, §§6, 709.....104
Cyc., Vol. 13, 731..... 97
Donnell v. Hering, &c., Co., 208 U. S. 267.....101
Engel v. Fischer, 102 N. Y. 400.....137
Erickson v. Revere, &c., Co., 110 Minn. 443.... 91
Exchange Bank v. Macon Const. Co., 97 Ga. 1...103
Farmers Nat'l Bank v. Fletcher, 44 Ia. 252....145
Fee v. Brown, 162 U. S. 602..... 81
Fertilizing Co. v. Hyde Park, 97 U. S. 659..... 99
Fitzgerald v. Missouri, &c., Ry. Co., 45 Fed. 812 101
Flemington Bank v. Jones, 15 N. J. Eq. 244....115

Gallager v. Germania Brewing Co., 53 Minn. 214 90
Gaynes v. Stiles, 14 Peters, 322..... 97
Gibbons v. Mahon, 136 U. S. 549.....101
Glenn v. Liggett, 135 U. S. 533..... 99
Goodnaugh v. Warren, 5 Sawyer, 494.....144
Greemeyer v. Coate, 212 U. S. 434..... 72
Hafeman v. Gross, 199 U. S. 342.....56, 68
Hale v. Henkel, 210 U. S. 43.....100
Hall v. Nelson, 23 Barb. 88.....145
Havenden v. Annesley, 2 Schoales & Lefroy, 607 128
Hargig, In Matter of, 15 Abb. Pr. (N. S.) 179...117
Irvin v. Smith, 17 Ohio, 226.....145
Jennings v. Kiernan, 35 Ore. 349.....144, 145
Johnson v. Drew, 171 U. S. 93..... 71
Johnson v. Robinson, 20 Minn. 170.....146
Kirby v. Lake Shore, &c., R. R., 120 U. S. 130...130
Kurchelt v. Union, &c., Inst., 118 N. Y. 358....147
McAlpine v. Hedges, 21 Fed. 689.....131
Machem Modern Law of Corp, §1076.....104
Manaudas v. Mann, 14 Ore. 450.....144
Massachusetts Turnpike Corp. v. Field, 3 Mass. 210 129
Maxwell Land Grant Case, 121 U. S. 325..... 69
Merchants Nat'l Bank v. Wehrmann, 202 U. S. 295 100
Miller v. McIntyre, 6 Peters, 62.....143
Miller v. Sherry, 2 Wall. 237.....143
Moore v. Thomas, 1 Ore. 201.....144
Murray v. Ballon, 1 Johns. Ch. 567.....144
Musgrove v. Bonser, 5 Ore. 313.....144

New Banking Co. v. Montgomery, 95 U. S. 16...116
Oregon, &c., Ry. Co. v. Postal, &c., Co., 111 Fed 842 103
Patton v. Hoffman, 61 Wis. 20.....103
Picket v. McGavick, 14 N. B. R. 236.....117
Pine, &c., Co. v. Bailey, 94 Fed. 258..... 77
Pomeroy Eq. Jur., Vol. 2.....85, 146
Puget Sound Nat'l Bank v. Mather, 60 Minn. 362 90
Rosenthal v. Walker, 111 U. S. 185.....117
Roses Notes, Vol. 3, 225.....143
Salomon v. Salomon & Co., A. C. 22, Law Journal 1897, Vol. 66, p. 35.....104
Secard v. Davis, 6 Peters 124..... 97
Seymour v. Fletcher, 16 Col. 188.....145
Sherwood v. Sutton, 5 Mason, 143.....128
Smith v. Williams, 44 Mich. 143.....145
Stuyvesant v. Hone, 2 Sandf. Ch. 419.....145
Surety Company v. Pauly, 170 U. S. 133..... 78
Trout v. Smith, 20 Johns. 32.....129
United States v. Budd, 144 U. S. 154.....56, 69
United States v. Biggs, 211 U. S. 507..... 56
United States v. Stimson, 197 U. S. 200..... 69
United States v. Throckmorton, 98 U. S. 61.... 71
United States v. White, 17 Fed. 561 72
United States v. San Jacinto Tin Co., 125 U. S. 273 .....69, 74
United States v. Winona, &c., Railroad, 165 U. S. 463 .....123, 132
United States v. Southern Pacific Railroad Co., 184 U. S. 49..... 81

United States v. Detroit Lumber Co., 200 U. S. 321 83
United States v. Keokuk, 6 Wall. 514..... 99
United States v. Chandler-Dunbar Water Power Co., 29 U. S. 447.....125, 132
United States v. Exploration Co., 203 Fed. 387 126
United States v. Maillard, 4 Ben. 459.....136
United States v. Winona, &c., Ry. Co., 67 Fed. 948 143
United States v. Central, &c., Ry. Co., 111 Fed. 449 143
United States v. Martinez, 195 U. S. 469.....143
Van Allen v. The Assessors, 3 Wall. 573..... 99
Vance v. Burbank, 101 U. S. 514..... 73
Wade on Notice, §§363, 364, 365.....146
Walker v. Goldsmith, 14 Ore. 125.....144, 145
Williamson v. United States, 207 U. S. 425.... 56
Windon v. Schuffel, 39 Minn. 35.....146
Winona, &c., Co. v. St. Peter, &c., Co., 23 Minn. 359 91
Wood v. Carpenter, 101 U. S. 135.....142

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 750.

THE LINN & LANE TIMBER COMPANY AND CHARLES A. SMITH, *Appellants,*

vs.

THE UNITED STATES OF AMERICA, *Appellee.*

STATEMENT OF THE CASE.

(References to pages of Printed Record.)

When the public timber lands in Oregon began to have some value, many persons took up the vocation of "locators" (1024), which consisted in furnishing descriptions of desirable tracts to parties wishing to acquire such lands from the Government, in showing them the timber and its location, and, sometimes, in assisting them to make the necessary entries at the land office (582). William G. McKinley was such a locator and was also dealing in Oregon timber lands (582). Another such dealer was Stephen A. D. Puter (657). These two men were well acquainted, having had dealings between the years 1892 and 1895 (478).

The lands in Linn County, not far from Brownsville where McKinley lived (658), had recently been surveyed and become subject to entry at the United States Land Office at Roseburg. William R. Mealey was an old settler at a place called Sweet Home, near which there was a heavily timbered tract. Mealey had assisted in making the government survey and was well acquainted with the timber. He ascertained in December, 1899, that the tract referred to was being cruised by the Northern Pacific Railway Company with a view to its appropriation by the scrip of that company and brought this fact to McKinley's attention (388, 410, 478). The latter, in turn, put himself in communication with Puter, and as a result the three entered into a contract about January 7th, 1900, to the effect that Mealey should furnish the others descriptions of the best timbered tracts for a consideration of $10 per quarter section (389, 411, 478-80, 682).

The land was subject to entry by different kinds of scrip other than that of the Northern Pacific—scrip which was then in the market at from $3 to $4 per acre (597-8, 1033-4, 1337-8, 1365-6); it was of little value, as deeded lands were selling at from $3.50 to $5.50 per acre (749); but Puter and McKinley were in great haste to prevent these lands being taken by the railroad company and lacked the money for the necessary scrip, so they determined to get persons entitled to purchase from the Government under the Timber and Stone Act (20 St. 89) to file at the land office on the de-

scriptions furnished by Mealey.

Puter and McKinley's ultimate purpose was to become able to dispose of the lands to which title might be acquired and at the same time to so deal with the entrymen that they might file in good faith, in compliance with the provisions of the act. The plan was to locate prospective entrymen for a fee of $100; to pay the expenses connected with the entries and the $2.50 per acre government price; to take a mortgage on the land for such fee, expenses and price, and for enough more to give the entrymen, respectively, from $75 to $100 from the proceeds of the loan; to have no agreement or understanding with the entrymen concerning any sale or conveyance of the land prior to final proof, but after that to get control of the land by buying from, or selling for, the entrymen, and thereby make a profit on the land (745-6).

Pursuant to this plan fifty-seven entries were made at the Roseburg land office from and including January 19th to February 26th, 1900 (242-7). Puter made one himself; his wife one; two or three were made by persons whom Puter procured; the rest were procured by McKinley and one Daniel W. Tarpley, whom Puter and McKinley employed for that purpose (390-1, 583).

The plan of not having any agreement or understanding with the entrymen about a sale of the land was adhered to (412-13, 416-17, 425-28, 587).

Charles A. Smith was at this time residing and engaged in business as a lumber manufacturer at Minneapolis (1333, 1350). He was acquainted

with Frederick A. Kribs, having employed him to cruise and purchase timber lands in Minnesota (1351-2). Kribs had then recently gone to the coast to deal in timber lands on his own account (1009, 1011). Before leaving, he and Smith had an understanding that Kribs should keep Smith informed of existing conditions on the Coast, and of opportunities there to purchase timber lands, and if Smith availed himself of such opportunities he should pay Kribs for his services by the acre (1009-10). Kribs was at full liberty to deal for himself and others and did so to a large extent (1011, 1026, 1052, 1055-6). The exact amount per acre to be paid was not fixed; the understanding was that if Smith should become a purchaser they would later agree on the amount (1010).

On December 21st, 1901, when there was an accounting between them for timber purchased by Smith up to that time under this arrangement, Kribs' compensation per acre was fixed at 27½ cents, but for the acreage as to which patents had not issued, he was to be paid from time to time as patents were issued, and meanwhile he was to exert his best endeavors to procure complete title (849-852, 1052).

When 19 or 20 of the filings referred to had been made, Puter left Oregon for the East on business connected with Oregon school land certificates for 60 quarter sections in Coos County which he had pledged to one Baldwin of Appleton, Wisconsin, for $15,000. The certificates had to be redeemed by March 1st, 1900 (750), and the purpose of the

journey was to find a purchaser for these school lands. He left Portland January 21st (514), destined for West Superior, Wisconsin, at which place and at Duluth, Minnesota, he spent the time until January 26th or 27th. Finding no purchaser at these places, he proceeded to La Crosse, Wisconsin, where he remained to January 28th or 29th (520-21). From there he went to Milwaukee; thence to Minneapolis, January 30th (522-3); thence back again to La Crosse, January 31st (524); thence to Appleton, Wisconsin, February 1st, (525); thence to Chicago, February 3d (526); thence to New York, where he appears to have been on February 5th (527); thence west, again, to Minneapolis. Here on February 7th or 8th he met for the first time Charles A. Smith (750, 1345) and that meeting resulted in the latter taking a written option on these school lands at $5.37½ per acre (1244-7).

The option provided for a preliminary examination of the lands; then, if Smith should desire, a payment of the $15,000 to Baldwin, and a transfer from the latter of the certificates, to be held as security for the payment; then within a fixed time payment of the balance of the agreed price if Smith should decide to purchase (1245-6).

At the time of this agreement (February 8th), Smith gave Puter a letter of introduction to Kribs at San Francisco, for the purpose of having the latter go to Coos County and make the preliminary examination contemplated by the option. Puter thereupon started homeward, going first to Appleton to inform Baldwin of his arrangement with

Smith; thence to Chicago February 13th (574); to Omaha on the 14th (753), arriving at San Francisco about the 18th (756, 528). He then for the first time met Kribs. He must have presented the letter of introduction on that or the following day, for on February 20th he wrote McKinley that he intended to go to Coos County on the 21st, evidently with the intention of showing Kribs the school lands (531, 759, 1012). Kribs, however, concluded not to go on account of stormy weather and the short time remaining for making the payment to Baldwin (768, 1012, 1247), so Puter took up negotiations with one Peyton and obtained from him the money with which to redeem from Baldwin (768, 779, 1013). Thereby ended the first and only transaction which Puter had with Smith or Kribs prior to March 1st, 1900. By this time all the entries in question had been made, the date of the latest being February 26th (245).

From an almost daily correspondence between Puter and McKinley, it appears that Puter remained on the Coast, principally at San Francisco, until March 20th, and that during this time he and McKinley were negotiating with different parties from Wisconsin, some of whom were then on the Coast, to raise the funds required in connection with final proofs (533-40, 590-93, 761-66). On March 21st Puter started east again (538-9). He arrived in Minneapolis March 23d (540) and from there went to Appleton on his business with Baldwin (540). Smith does not remember that the Linn County lands were called to his attention by

Puter on this occasion at Minneapolis, but Puter claims they were, and testifies that it was the first time he mentioned these lands to Smith (772). If he is right, the date must have been March 23d, 1900 (540), nearly a month after the last of the entries.

The following is Puter's version of what occurred between himself and Smith:

"I seen Mr. Smith and said that we had fell down on the Coos County lands; that I had another deal proposition that I thought was a good deal better—more money, worth more; that I had eight or ten thousand acres I expected to get title to that I could deliver to him for about $7 an acre and wanted to know if he wouldn't take it. And he questioned me where it was located, and how much timber was on it. I told him it was Linn and Lane County, and I thought I could guarantee 75,000 feet per acre. Well, he said he would like to take it. And he says, 'You see Fred, and whatever arrangements you can make with him, you can bank on my carrying it out.' That was the sum and substance of the conversation" (695-6).

Smith came out to San Francisco later in March. It must have been towards the last of the month, for, as we have seen, Puter was at Appleton, Wisconsin, as late as March 24th. He met Puter and Kribs, and according to Smith's testimony this is the first time Puter called his attention to the Linn County lands (1338). Smith's version is:

"Mr. Puter claimed to have some eight or nine thousand acres of land which he offered for sale. He made representations as to amount of timber and its availability for logging. He claimed that the lands would average 75,000 feet to the acre, that the lands were comparatively level, a splendid

logging chance; the timber was a fine quality of yellow fir; that the timber was tributary to drivable streams which would make it practical to drive logs to Portland. Then the question came up as to price, and he offered to sell these lands for $6.00 per acre. This was the first timber that I figured on on the Coast, that is, not the first timber that had been offered to me, but the first fir timber outside of a tract which he had offered to sell me before which nothing came out of—this was the first tract that was offered to me * * * so that I was not familiar with the stand of fir timber; I never had had any investigation made as to it, and 75,000 feet per acre seemed astounding to me * * *. I told him in substance that if the timber was as he claimed, and the topography of the country, and the streams, I would take the land. Mr. Kribs was present at the conversation, and then we had an understanding there at that time that some time in the near future when Mr. Kribs would go up into Oregon, he would go and look these lands over, and if he found the lands as Mr. Puter claimed, then I would take them. In other words, Mr. Kribs should be the judge whether the lands and everything was in accordance with the representations of Mr. Puter.

"Q. At this time was there anything said concerning the title to these lands? A. There was nothing said except this: Mr. Puter claimed that he had these lands for sale.

"Q. Anything said about entries having been made under the Timber and Stone Act recently of those lands? A. No, sir.

"Q. Or that they had to be proved up under any law of Congress before they could be sold; anything of that sort? A. No, sir. * * * There may be some other things that a question might jog my memory, perhaps, but whatever was said the impression that I had was that Mr. Puter either owned or absolutely controlled these lands, and was in position to deliver an absolutely good title. * * *" (1338-41).

Puter, as we have seen, testified that the place of his conversation with Smith was at Minneapolis; otherwise his version agrees substantially with Smith's. He does not claim that he ever informed Smith of the character of the title.

Kribs went to Oregon, arriving at Albany April 1st (475, 542, 1015). Here he met on his arrival McKinley, and on the next day Puter, and with McKinley he went and spent the next two or three days examining the land (381, 543, 1016-17). On this trip Kribs learned that the lands had been filed on under the Timber and Stone Act, and that final proofs had not been made. He also learned at this time that McKinley had been arrested on April 1st on a charge of subornation of perjury in connection with some of the filings, but had been discharged; and at this time, or shortly afterwards, he also learned that the Northern Pacific Railway Company, or its attorneys, had filed notice of contest at the land office as to all or most of the entries.

Negotiations resulting in Kribs furnishing money for proving up on thirty-three of the entries were carried on entirely between himself and Puter. McKinley did not figure in those negotiations except as he may have furnished information. Puter's testimony on the subject is as follows:

"I went to San Francisco and I spoke to Mr. Kribs about it and told him the situation. He said that he would come to Oregon and he would look the matter over and if it was all right he would take it up with me. So I believe I met him a few weeks after that—a short time. He wanted to

know what it was going to cost, and I told him that title hadn't been perfected to these lands, but I expected that I would be able to get them at a certain figure and there would be a certain amount of money required to make proof on the lands, and I would like to have him advance that money. Well, at that time he hesitated about advancing the money. He said he would go up and see about it. Well, the best of my recollection is he had come up and he had met McKinley; I had either introduced him to McKinley or given him a letter; but at any rate he went up to the lands with McKinley and Tarpley, or either one of them, and was satisfied to advance the money. I told him it would be necessary for to have at least $600 on the quarter section. And that I—I thought that I would, under the circumstances—having an equity in the land, etc.—I would be able to get hold of those lands after they proved up, and I would turn the title over to him for a certain figure. Well, there wasn't much said then. He didn't say whether he would advance the money or not. At any rate I knew the Northern Pacific filed a contest against all those entries, and I went back on to Kribs again and I told him the circumstances, that I had to have somebody to back us up in the lands and that I thought I would be able to secure the lands for $7.00 or a little less—or $6.50. Well, at any rate, he agreed to—he said that as we was in the deal, etc., that he would stand by and advance the money to make final proof on those lands. So it seems that the contest was set for the same day that the proof was to be made and of course it was necessary to have the money there, but Kribs hesitated about having the money at that time. He thought it would not be necessary to have the money there for probably some time afterwards as the testimony would be taken and would be submitted to the General Land Office before any money, but I insisted that I thought there would be a compromise; that the Northern Pacific wouldn't appear on the case and it was best to have the money there. So he agreed—he said he would

wire Smith to forward the money, and he did—informed me the money was there. So we all went to Roseburg on the day that proof was to be taken, and the contest, and I think the contest cases started in first, which lasted about two days; and I believe I employed Mr. Crawford and Shupe.
* * *

"And the understanding at the time was that—from Mr. Moulton or from one of the attorneys, I don't know which, or from Mays—that they would give me those 24 claims at the market price. So proof was submitted on the 33, or at least on some twenty odd that was advertised for that date, and certificates issued. Now, as McKinley and I had made arrangements to pay these fellows a hundred dollars each and that idea was conveyed to them some way through some of those parties—because they all understood it, that that was the situation of the case, every one of them—I believe the mortgages were drawn up and we both went to work that same day in procuring deeds. Some of the deeds I believe was dated—at least left blank, and I believe I paid some of the entrymen right there and then, a few of them, as far as my money went. But, anyway, inside of ten days, I had procured the deeds to what proofs was made and I met Mr. Kribs at Albany and told him that I had procured deeds to all of these lands and if he wanted it for that figure, he could take it—have them. So he then and there paid me the money. I think it was $5.00 per quarter or $5.50 an acre, that we had agreed upon, and he paid me all except $1,000, which he said Smith his requested him to hold up until the patents were issued; there may be some trouble in getting patents—some costs, and he wanted to hold out a little, so I consented and a few weeks after that the proof was put into the other claims, and I don't recollect now whether I procured the deeds for that or how they were gotten, but I think they were about the same way, and there was another settlement made. And the last payment was made of a thousand dollars along December that same year, which happened in an-

other transaction, so that ended the transaction with Kribs so far as it went up before patents was issued" (662-66). * * *

"Q. Well, now, how long was it before the proof, Mr. Puter, that you arranged with Kribs that he should take the land? A. Well, I will tell you; there was nothing definite about that. It seemed to be an understanding. I believe Kribs knew that he was to get the land, but there was no direct conversation about it. I said to Mr. Kribs that 'I will be able to deliver—I think I can get those claims at a certain figure.' He did not say anything, yes or no. But I understood from his actions that he was willing to take it. He didn't say no nor yes. * * *

"Q. You knew that he was willing to take the land before the first proof was made? A. Well, I surmised that in my own mind. I thought he was. I didn't think that it was exactly for the interest that there was in $600 when he agreed to advance $600 on a mortgage; that it was pretty sure that he would take the land, although we did not have a definite understanding all together. * * *

"Q. But supposing Kribs had just kept that deed and not paid you any more money at all; didn't he have a deed? A. Why, no; I had the deed, and he never got possession of it till I got the money" (680-81).

* * * * *

"Well, I was not exactly sufficiently acquainted, in fact, with him for to go into the details with a stranger that I hadn't only met two or three times, in regard to how McKinley and I was procuring title. I had to feel him out, in a way, the best I could. And I thought by his actions that he agreed to put up the money with the expectations of getting the land at my price. But when we came to have the law suit with the Northern Pacific, he backed out. And I went after him again and persuaded him to come in and help us out, which he did" (699).

* * * * *

"Q. Did he pay $600 to anybody? A. Well, it seems that a day or two before the proofs, to the best of my recollection, the money was there for to pay for that purpose at the rate of $600 an entry, or more, and as the proof was put in, there was a certain amount of money to go to the Land Office, that was to come from Kribs, and there was a certain amount to go to these entrymen. I wanted that, and I am pretty sure that Fred had given me a check for three or four thousand dollars, maybe two thousand dollars—I had some money of my own; and as soon as proof was put in I paid those parties, some of them, right there, got their deeds—and others I paid three, four or five days afterwards. But when I made the settlement with Fred for the balance I went to him and said, 'I have got the deeds now to those 20 claims. Do you want to take them?' He says, 'All right.' And that is when we figured up, he kept the book account, what he paid me, and what he paid the Land Office and give me a check for the difference, which was seven odd thousand dollars" (704).

Kribs' version is:

"He said to me that he had located 57 pieces of land; that he had agreed to furnish these people money—they in turn were to give him $200, his location fee and expenses that he was to; that he had agreed to furnish this money. It was getting pretty close to the time they should prove up and he thought he would have considerable trouble if he didn't raise the money.

"Q. Did he say anything about a mortgage or anything of that kind? A. Yes; they was to give a mortgage on the land as security to him, if he raised the money (1014). * * * Next he spoke of these claims again; gave a description of the lands, quality, quantity, and said that they were taken by a lot of poor fellows, and that after they would have title a man would not have much trouble to make a bargain for them; that he wanted anyway to get enough for the first payment and enough to get his fee out of it and take a short

time mortgage. He was sure that he could buy the lands afterwards—something like that (1015). * * * I left California and I reached Albany Sunday, April 1st, 1900 (1015).

"Q. Then who did you meet? A. Mr. McKinley.

"Q. Did you have any talk with him? A. He was there to meet me. At first I was going through to Portland. I received a telegram on the train to stop off at Albany. * * * I rustled around, got my baggage off and stopped off at Albany on Sunday instead of going through.

"Q. Who did that telegram come from? A. Mr. Puter. * * *

"Q. Had you ever been in the state of Oregon prior to that date? A. That was my first trip. I met McKinley. He said he was there to go out and show me those lands. Mr. Puter was not there. He came next day. I only saw him a few moments and told him McKinley and I were going to start up, I think that afternoon, for the lands (1016-17). * * * McKinley and I went over the lands and other parties were along with us (1017). * * * I talked with him (McKinley) considerable going and coming from the lands at the time we were driving. I asked him about the lands, about the location and who the people were. I got all the information that I could from him (1017-18). * * *

"Q. At the time of that visit, did you know when the final proofs were to be made on those claims? A. I was told when they were to prove up. I think Mr. McKinley told me that; they had given me the dates (1018-19). * * *

"Q. When did you indicate to McKinley or Puter that you would advance the money to make final proof? A. Shortly after I had seen the timber. That is, after I came back from the road and thought it all over and made up my mind that I would make short time mortgages anyway.

"Q. Was there anything said about buying the land, and if so, state what? A. There was nothing said at that time about purchasing the land

at all.

"Q. What amount did you agree to advance? A. $600.

"Q. On each claim? A. Yes (1019). * * *

"Q. When, if ever, was anything said about buying the claims? The first talk about buying the claims? A. I think it was the evening after the first 18 proofs were put in at Roseburg, possibly. I think that was the time (1020). * * * I talked with Puter about it, and he said that he thought he could handle all these people. They didn't have much of any money. They should have $6.00 or $6.50 an acre—something like that. And I suggested preferably $5.00 an acre would be enough for that kind of location. Anyway, he compromised at, I think it was $5.25, or something like that.

"Q. Well, did you tell him that you would buy the lands, take the lands at $5.25, or any other sum? A. That as soon as any of them had receipts and were ready to sell, I would buy the lands.

"Q. At that price? A. Yes.

"Q. * * * What did you hear about the Northern Pacific contest that has been referred to? A. I looked into it and figured that it was nothing but a scare to drive off the people who had filed on the lands. * * * I asked McKinley. I think we talked with Puter, and I talked with Mr. Sanders, a representative of the Northern Pacific road. * * * He said a railroad company had a right to run a bluff once in a while the same as anybody else (1020-21). * * *

"Q. * * * Who looked after the taking of the mortgages, or the conveyances, as the case might be, for you? A. The work, as I recollect, was done principally by Mr. John H. Shupe, an attorney. He died, I think, about six—five or six years ago. * * * I met him just about the time those proofs were being made. I consulted with him and talked with him about those lands (1021). * * * He was recommended as a good, honest man, and a good, competent man. * * * I remember talking to him about this alleged contest

by the railroad company. He said it didn't amount to anything, and I asked him if it would be all right to advance the money for these people and take mortgages on the lands. He said yes.

"Q. Did you believe that? A. Yes, sir, (1022). * * * I was familiar in a way with the Timber and Stone law before I came here. I didn't need a great deal of advice as to what would be legal in the matters, yet at the same time I got all the information that I could from him—got his version of the case; he said that the people were all right; the railroad company had no right to contest them. I told him I was figuring on loaning the money; he said it would be all right and I made arrangements with him to attend to it.

"Q. Now, at that time had you heard or had it been suggested to you from any source that those entries were fraudulent? A. Never heard anything of the kind. At the time of the contest I talked with five or six people around there, and the information they gave me was entirely to the contrary.

"Q. What did they state to you in regard to the character of the entries? A. That they located these lands in a rush to head off the railroad company and thought it was funny that a big corporation like a railroad company would try to beat them out. I said, 'Was you hired to go on there?' They says, 'We was not. Had no bargain; took the land for themselves.'

"Q. Did they say anything to you about who located them? A. I don't know as I asked them about that, as I knew Mr. McKinley had located about everybody (1023-24). * * *

"Q. Now, did you instruct Mr. Shupe to look after the money part of it, the taking of securities and the taking of the deeds? A. I did.

"Q. And he did that for you? A. He did.

"Q. * * * At the time that you instructed Mr. Shupe to take these—make this loan or take the conveyance for you, as the case might be, did you actually believe that these entrymen might rightfully and lawfully mortgage or sell, as the

case might be? A. I did (1025). * * *

"Q. There has been some evidence in this suit that Mr. McKinley was placed under arrest at the instance of the Northern Pacific people at or about the time that you first visited Oregon? A. Yes.

"Q. What did you learn or hear about that? A. That they had a hearing at Albany and he was discharged. There was nothing to it.

"Q. Had that hearing been had before you went to the land, or was it held afterwards? A. I think it was about—I don't know whether it was before or after. I know there was a hearing; never paid much attention to it.

"Q. You ascertained that he was discharged? A. He was discharged, yes, sir.

"Q. When did you first learn about the relations between Puter and McKinley and their plans with reference to the making of the entries? A. At the time I went on the land Mr. McKinley told me that he had located these several people on the land, and had located them to make a location fee out of it; and after the lands were proved up if they could handle them and make any additional money they would do so if they could.

"Q. Did he state to you why they wanted a $600 loan? A. Enough to pay for the land and enough money included for their locating fees and the expenses they had been to" (1027-28).

Final proofs on the 33 entries were made on April 18th and 19th and May 16th (246-7). Twenty-eight of these entries are involved in this suit.

While mortgages and deeds were being taken by Kribs, he received remittances from Smith, so that it was the money of the latter that was used; it also appears that at Smith's direction the deeds were taken in the name of his brother, John A. Willd, then living in Minnesota (1372), but since dead. This was done because it was considered that should Smith be known to be purchasing tim-

ber, higher prices might be demanded (1024-5). Smith was not informed concerning the title, or that mortgages were taken, or that there had been a contest with the Northern Pacific until he came to Albany, Oregon, on May 21, at which time all the deeds to Willd had been taken (710, 774, 1341-4). Puter then informed him that he had an understanding with the railroad company about purchasing at market prices the 24 quarter sections that were relinquished (668-9, 645) after the company should have acquired title and promised to negotiate for a purchase of these for Smith. As to the lands which Smith then found conveyed to Willd, he testifies that they were taken in good faith (1345-6). The consideration paid amounted to upwards of $25,620, of which something over $12,200 represents what was paid to the Government at the time of the final proofs (559, 1020, 1346).

Britton & Gray, attorneys for the Northern Pacific, informed the Commissioner of the General Land Office on February 26th, 1900, that some of the entries in question were being "engineered by S. A. D. Puter of Portland, Oregon, and H. G. McKinley of Brownsville, Oregon," and characterized the entries as "fraudulent" (1110). On March 10, 1900, these attorneys again wrote to the Commissioner and said that "according to the information of the company, all these filings were made under the supervision and management of one Stephen A. D. Puter of Portland, Oregon, who, with his wife, also made filing, and one Horace G. McKinley, whose address is Brownsville, Oregon."

* * * "We, therefore," they said, "submit the above information for such use as you may desire to take looking towards the cancellation of the timber land filings aforesaid" (1111-13). At the time these communications were sent to the General Land Office, like information was furnished to a special agent of the Government, S. S. Mather, who reported on the subject to the Commissioner on February 24th, 1900 (806). Doubtless as a result a special agent of the General Land Office, C. E. Loomis, residing at Eugene, and with headquarters at Oregon City, Oregon, was detailed to attend the hearing of final proofs and to cross-examine the entrymen (626-7). He says:

"There were no questions given to me to read to them. It was left entirely to my own election what I should ask them. And as fast as they made their proofs, I went right at them, and asked such questions as occurred to me in regard to their seeing the land, having been on the land, having made prior bargain to sell, and such things that were unlawful. And the questions and the answers were taken down by a stenographer, and I never saw them afterwards. They were sent to Washington with the papers. I know nothing about them afterwards" (627).

The reports of Special Agents Mathers and Loomis to the General Land Office are not in evidence, but these reports, in connection with the letters from Britton & Gray, resulted in the Commissioner suspending 23 of the 33 entries and in his detailing on November 26th, 1900, another special agent, E. D. Stratford, "to make a thorough and searching investigation * * * with the

view of ascertaining, in particular, exactly what connection McKinley and Puter had with them" (806-8). Stratford reported December 24th, 1900, and recommended that the remaining entries also "be held up and that patent do not issue for either of them until I have had an opportunity to make investigation of the circumstances connected with their entry as the same parties are interested in them and they are each surrounded with the same suspicious circumstances as are those mentioned in your letter" (the 23)—(809-10). On this recommendation the remaining entries were also suspended on January 16th, 1901 (811).

Stratford, after taking up the investigation, solicited and received pecuniary favors from Kribs in the form of two or three small loans (1031-3), and on or about March 8th, 1901, he also sold to Kribs a forty-acre tract of land for $400, which, though worth this sum, Kribs would not have bought except as a matter of favor to him (1031-2; 963-4). On March 9, 1901, Stratford reported to the General Land Office concerning the suspended entries. As to those which had been suspended upon his recommendation, which included eight of those involved in this suit, he said:

"As I have not been able to find any tangible evidence of fraud having been committed in connection with said entries, or any one of them, I hereby recommend that said entries be relieved from suspension and that patent issue in each case in due course" (818-20).

As to the 23 entries previously suspended, which included 20 of those involved in this suit, he re-

ported at considerable length. He called attention to the dates of the entries, to the contest of the Northern Pacific in the Roseburg Land Office in which it was charged that the entries were for speculative purposes and under express or implied contract for the sale of the land, to the fact that McKinley and Puter were receiving fees for locating the entrymen, to the conveyances to Willd, and in conclusion said:

"When it is considered that three special agents, agents, including myself, the agent and attorneys of the Northern Pacific Company, who were anxious to have said entries cancelled, in order that the company which they represented might acquire the land, and the United States attorney's office have all had these entries under investigation at different times, and that in no instance has fraud sufficient to justify a contest been discovered, it would appear to be useless to contest the entries further.

I therefor recommend that said entries and each of them be sustained and that patents issue for the land" (812-17).

On April 15th, 1901, after these two reports were received in the General Land Office, the Commissioner wrote Stratford, reviewing at length the information obtained to that time.

"These investigations," he said, "were ordered upon charges made by representatives of the Northern Pacific Railway Company, who stated that they had reason to believe that all of said entries were being made for speculative purposes under the supervision and management of one Stephen A. D. Puter of Portland Oregon, and Horace G. McKinley of Brownville, Oregon. * * *

"Before Special Agent Mathers turned over his work in Oregon to you, he had made a partial inves-

tigation of these cases and he reported having interviewed several parties with reference to the matter, among whom were Rufus Brum, Jennings F. Whitney and William J. Drinkard. These men filed applications to enter tracts in township 14 S. R. 3 E. under the Timber and Stone Act at the time when the applications were filed on which the entries in question are based, but they did not appear to make final proof at the time advertised.

"They stated to Mathers before the date set for final proof that McKinley had induced them to make the applications, promising to pay all expenses, and after entry was made, either to buy the land himself or to find a purchaser for it, so that the entrymen would make $40.00 or $50.00 apiece, and perhaps more, from the transaction. Shortly after these conversations McKinley was arrested at the instance of Mr. Mathers for fraud in connection with this matter, and it seems that this fact deterred these parties and a number of others from completing their entries. The entries that were made, however, in said township, were apparently all made under the same circumstances as were contemplated in these three cases, That is, the parties were induced by McKinley or Puter to make the entries, with the understanding, in each case, that the land should be sold as soon as title had been obtained thereto. In other words, the entries were made purely for speculative purposes, and not in good faith to appropriate the land to the entrymen's own exclusive use and benefit.

"Under the circumstances this office is not willing to pass these entries to patent until it has more conclusive evidence than has yet been shown as to the impossibility of proving their fraudulent character. Your report merely makes the general statement that you have made diligent inquiry, etc., and had found the entrymen and their witnesses very loath to give any information on the subject. It does not show of whom you made inquiries, nor what information was given you with relation to the matter nor is it stated what reasons were alleged by the entrymen and their witnesses for not making a

statement to you. Their refusal to do so is itself a strong indication of fraud.

"You are directed to make a thorough reinvestigation of this matter, and to make detailed reports showing just what efforts you have made to ascertain the facts, and exactly what information you have been able to secure.

"You will call upon each of the entrymen for an affidavit, showing all the circumstances connected with his entry, at whose suggestion the entry was made, who furnished the money to pay for the same, and on what conditions, what understanding he had with the parties furnishing the money or with other parties, as to the use he should make of the land or the timber after he had perfected title, when he examined the land, and what means he used to identify it, etc.

"You will also report the exact date when the land was sold in each case, the consideration for the transfer, the name of the transferee, and the character of the instrument conveying the land. If the entryman mortgaged the land you should state the facts concerning the mortgage shown by the county records. * * *" (822-26).

Under this instruction Stratford proceeded to take affidavits from the entrymen, including Puter, and from Tarpley, McKinley and Kribs. The affidavits were taken during the month of July, 1901, except Puter's, which was taken October 1, 1901 (1119-45; 1148-1213). In this way there were taken in all 22 affidavits, 17 thereof from persons whose entries are involved in this suit. McKinley and Kribs were instrumental in giving Stratford the addresses of the entrymen and in bringing the entrymen before him. Generally speaking, the affidavits were to the effect that the entrymen had been located by McKinley; had borrowed $600 from Kribs, had sold the land to Willd at from

$800 to $850, and had paid McKinley or Puter a location fee of $100. In some respects the affidavits were evasive. Puter's affidavit contained false statements. This done, Stratford, on December 28, 1901, wrote to the Commissioner of the General Land Office as follows:

"If the interests of the service will permit, I would be very greatly pleased if a transfer could be arranged which will assign me to some district east of the Rocky Mountains, for a time at least.

"My reasons for this request are as follows:

"I now have under investigation at least 100 Timber and Stone entries, which are alleged to be fraudulent, and others are being continually added to the list. I have gathered quite a large amount of testimony which being in writing could be used by any one succeeding me equally as well as by me. A great many of these cases are practically ready to report to your office. About 75 of these cases relate to land which has been sold to Mr. Frederick A. Kribs, a wealthy timber land speculator, or parties whom he represents, and many of them no doubt should be recommended for cancellation. Mr. Kribs has employed, to look after his interest in these cases, Mr. A. M. Crawford, an attorney residing at Roseburg, a personal friend and next-door neighbor for a number of years, Hon. F. P. Mays, State Senator, of Portland, Oregon, and now I am in receipt of a letter from Judge A. H. Tanner, of the firm of Mitchell & Tanner, attorneys at Portland, the senior member of the firm being Hon. Jno. Mitchell, United States Senator from Oregon, stating that his firm is also employed by Mr. Kribs and inquiring in regard to the status of the cases. Many of these entrymen are personal friends and neighbors of mine. While the above named attorneys are gentlemen of high standing, who would not attempt to exercise any improper influence in the cases, yet I think that it can be readily seen that my request is a rea-

sonable one, under the circumstances, and that it should not reflect against my official standing or integrity. If I should remain in charge of these cases, I shall certainly try to do my duty, without fear or favor, but I earnestly hope that an exchange can be arranged which will bring to this field a man of ability and experience, who is entirely free from the influences I have mentioned. I am of the opinion that the work in my hands is in such condition that it can be taken up by any other experienced man with but little delay and without injury to the service. The importance of these cases will be understood when it is remembered that the party or parties, now holding deeds to these lands from the original entrymen, have invested at least $100,000 in the land, and are prepared to spend a large amount to defend their titles. I would prefer, if it can be arranged, to go to Oklahoma, Colorado or New Mexico, as my boys are in school in Kansas, and I would be glad to be so located that I could visit them and my wife, who is with them, without consuming all of a 30 days' leave, in one trip, but if this cannot be arranged, I would prefer to go anywhere under the circumstances" (827-29).

This letter was answered by the Assistant Commissioner February 10, 1902, saying:

"You are instructed to complete the reports in all of the cases referred to, which you have examined.

"When your reports are received here the advisability of assigning you to duty in another district will be considered" (830-31).

After receiving this letter Stratford took affidavits of four additional entrymen on March 11th and 12th (1132-36; 1141-43; 1145-48; 1167-70). He thereupon reported on each of the entries to the General Land Office, forwarding all the affidavits taken. His report was attached to the af-

fidavit of Ira A. Pilkkington. In paragraph 16 of this report he reviewed the facts connected with all the entries, calling attention, substantially, to what is referred to above, and said in conclusion:

"I am frank to say that I have some reason to believe that every one of these entries were, and are fraudulent, but I am just as frank to say that I do not believe I can prove it. The testimony is before the department, and if the Honorable Commissioner differs with me and thinks a contest should be ordered in these cases, after duly considering all the facts, and will so indicate, the cases can be returned to me, and I will, if desired, change my recommendation, and make the effort of my life, to have the entries cancelled, or to assist any one who might be detailed to conduct the contests. I think the number and importance of these entries, justify this extended review of the facts and testimony in the cases. For the reasons herein stated, I recommend that this and each of the entries herein mentioned be closed and that the land go to patent" (1186).

By direction of the Secretary of the Interior all the papers in the General Land Office relating to the entries were transferred to him (831), and A. R. Green, one of his special inspectors, was detailed to go to Oregon and investigate these and other alleged land frauds in that state. Green went to Linn County early in the year 1902, made inquiries and reported to the Secretary on March 10th of that year (915-18). With reference to the entries in controversy the report was as follows:

"The following facts have been elicited in regard to the entry of a valuable body of fir timber in the extreme eastern part of Linn County, adjoining the Cascade Forest Reserve and situated partly in the Oregon City and partly in the Rose-

burg land district: About two years ago a man named John A. Willd, representing a lumber company of Minnesota, had these lands 'cruised' and through his instrumentality they were entered, principally under the Timber and Stone Act. The financial agent of this man was Frederick A. Kribs of Portland, Oregon. The cruiser was Horace G. McKinley, who was also the locator and induced the entrymen to take up the lands, representing to them that a mill company stood ready to take them off their hands as soon as final proof could be made and that he wanted only such applicants as would be ready to sell when the time came. Pursuing this policy, McKinley secured a number of men and women from among the class whose living is precarious, largely from the saloons and rooming houses and around the depots and wharves of the towns along the valley and the lands were entered, McKinley appearing in a number cases as a witness.

In 28 of the 67 cases referred to in this connection, the lands were mortgaged to Kribs on the day of final proof; eight tracts were mortgaged to him one day after proof and one tract three days after proof. Twelve tracts were deeded straight to Kribs on the day of proof and 28 tracts were deeded to Willd within five days after proof. One entryman, James H. Scott of Albany, Oregon, mortgaged to M. E. Watson on the day of final proof.

* * * * *

"Referring again to the cases where Kribs became mortgagee and Willd purchaser, immediately after final proof, a strong presumption of collusion is raised. Take the entry of John Harrison of Brownsville, for example. His final proof certificate is numbered 8235 and dated May 16, 1900. On the same day he mortgaged to Kribs for $600 and the day following he deeded to Willd for $1.00. An isolated case of this kind might occur in good faith and honesty possibly, but when it comes to a great number of cases of precisely similar facts, it is quite another matter. Kribs paid out on mortgages in three weeks in April and two weeks

in May, 1900, the sum of $18,600.00 for lands passed to final proof immediately preceding the date of the mortgages and immediately following these dates the same lands were deeded to Willd for $31.00, just enough to comply with the law regarding transfers of realty. The fact that the consideration was merely nominal in the cases of the sales, ought, it seems to me, to have weight in a judicial consideration of the matter. Also, the fact that public opinion has become debauched to the extent of hostility to an honest enforcement of the land laws in this part of the country should not deter our local officers from a vigorous effort to punish offenders.

"There ought to be less difficulty in proceeding against the homesteaders herein named who mortgaged their claims prior to final proof. These are matters, however, for departmental determination.

* * * * *

"The foregoing are not isolated and exceptional ceses, as will be seen from the consecutive numbers of the final certificates, but comprise nearly every entry for the dates given. This is significant as showing the extent of the questionable practices before these land offices.

"A complete remedy is not to be hoped for, but the evils might be checked if our land officers and special agents would be more alert to the frauds. It cannot be denied that at present the Government is held in contempt by the land grabbers. This is largely in consequence of a failure on the part of the land officers to comply with the law and regulations. For example, the oath is administered in a slighting and careless manner as though it was an obsolete formality; the statute for the punishment of perjury—Sec. 5392—printed at the foot of the application blanks under the Timber and Stone law, is seldom read to the entrymen; tracts other than those applied for originally are substituted on the spot by the applicant, for tracts ascertained to be taken, and the land officer says with smiling assent, 'Of course you have been over that tract also,' when it may be in fact true that he

never set foot in the state until that morning when he came across the Columbia from Washington. When I have called the attention of the officers to these things they have said to me, 'Life is too short to run down all the facts in these little cases; I have long ago ceased to have any confidence in human nature.' In other cases the receiver has accepted a lump sum of money for a number of timber entries which he had every reason to believe were being made in the interest of a lumber syndicate. When I called his attention to what I had heard in regard to this case, he said, 'No, sir; we made him separate it right there and have every man pay his share.' It is a common thing to hear the receiver advise entrymen that 'if they discover that their lands are more valuable for timber than for agriculture they can relinquish and take it under the Timber and Stone Act, which is simply an encouragement for these men to hold it as a homestead until they can find a purchaser for the timber and make arrangements for the purchase money' " (918-23).

On May 17, 1902, the Secretary of the Interior, in the form of a communication to the Commissioner of the General Land Office, reviewed at great length the law and facts in connection with the entries and decided that they should be relieved from suspension and go to patent (832-45). Pursuant to this decision patents issued August 12, 1902.

The lands covered by the patents were at Smith's direction conveyed by Willd to one Greacen on November 2, 1900, and by Greacen to one Rogers on February 11, 1901, and by Rogers to Nils O. Werner on December 21, 1904 (65); they were thereupon mortgaged by Werner for Smith's benefit to the First Trust & Savings Bank of Illinois

for $40,000, a mortgage which Smith afterwards paid, thereby leaving the legal title in Werner and the equitable title in himself, clear and unincumbered (1337, 1360).

About January 1, 1905, an investigation of alleged land frauds in Oregon was instituted by the Government through the attorney, Mr. Heney, and the special agent or detective, William J. Burns, Irvine Rittenhouse acting as their stenographer (893, 901). There was at this time a controversy pending between Puter and Smith, growing out of a timber deal for some redwood lands in Humboldt County, California (676; 736-9; 786-8). Puter, who was exceedingly hostile to Smith, concluded to avail himself of the investigation to compel Smith to pay what he claimed to be due him for the redwood lands. He accordingly told Heney and Burns that the entries referred to were fraudulent and induced them to have several of the entrymen subpoenaed as witnesses before a federal grand jury, then in session at Portland, and threatened to have Smith indicted on account of the entries (689; 905). When the entrymen came to Portland under subpoena they were taken by the marshal before Burns, who, assisted by Puter, procured affidavits from them (302, 317-18; 360; 369; 1213-16). The entrymen assert that Burns threatened to have them indicted and imprisoned (508-9). This is denied by Rittenhouse (905), but corroborated by Puter (744), who says, in substance, that they did not give their affidavits until they had been given to understand that they could not get

immunity from prosecution until they had confessed that they had violated the law (745). The tenor of the affidavits may be seen from Henry Blakely's and John Harrison's, which appear at length in the record (1213-16).

During the years 1900 to 1906 Smith purchased timber lands in Oregon so extensively that his holdings in Linn, Lane and Douglas counties amounted to 52,778 acres, of which 41,967 were in Linn, 3,371 in Lane, and 7,440 in Douglas (1250-51). This acreage in Linn County included the 4,480 acres or thereabouts involved in this suit, then standing in the name of Nils O. Werner. In May, 1906, Smith and two other persons organized a corporation under the laws of Minnesota called the Linn & Lane Timber Company, with a capital stock of $100,000, divided into $100 shares, "to buy, hold and sell timber and other lands and tenements in the United States of America, and to conduct forestry, mining and agricultural operations on the same; to carry on logging operations, and buy, sell, store and transport logs and other forest products for itself and others; to build and operate mills for the manufacture of lumber and other wood and forest products," etc. (940-51). The incorporators and members of the first board of directors were Smith himself, his wife, Johanna A. Smith, and John Lind. The organization of the company was completed May 31, 1906, a certificate to that effect being issued by the Secretary of the State of Minnesota on that day (1393-94). On June 4, 1906, Smith and his wife executed three deeds to these

52,778 acres, in which the company just organized was named as grantee, one deed embracing the land in each county (925-37; 1250-51; 1270). On June 9, 1906, Smith laid these deeds before the board of directors with a proposition to deliver them to the Company in consideration of its capital stock. The proposition was accepted by appropriate resolution (968-9), the deeds delivered, and the stock of the Company issued to Smith, with the exception of two shares, which were issued one each to Mrs. Smith and to Mr. Lind.

At this same meeting of the board resolutions were adopted to have the Company comply with the requirements of the laws of Oregon for doing business in that state as a foreign corporation (969). These resolutions were immediately carried into effect by filing an authenticated copy of the articles of incorporation, a declaration of purpose to do business in Oregon, and a power appointing a resident agent; and on June 25, 1906, the secretary of state for Oregon issued to the company a certificate that it had "furnished satisfactory evidence of its legal existence and its authority under the laws of its domicile to engage in the occupation, business or pursuit stated in said declaration, and that it had paid the declaration and annual license fees required by law," etc. (948-963; 1395-98).

Smith went abroad, leaving Minneapolis about June 11th, 1906, and did not return until the following October (1334), and the legal title to the 4,480 acres in controversy, standing—as we have seen—in the name of Nils O. Werner, was not con-

veyed to the Company until August 15, 1907, but on that day a deed from Werner and his wife to the Company was executed and delivered (945-7), thereby completing its title to the entire 52,778 acres in the three counties.

The share of stock issued to Mr. Lind was transferred by him to Smith's son, Vernon A. Smith, on January 8, 1907 (979), the date of the first annual meeting of the stockholders (950). The new board of directors then elected consisted of Smith, his wife and this son, Vernon (970). The minutes of this meeting show that, "In view of the fact that the corporation had no funds, and did not desire to dispose of any of its lands, Mr. C. A. Smith proposed to advance the money needed to pay the taxes and other necessary expenses from time to time as required, all advances made by him to draw interest at six per cent (6%). This proposition was accepted by the board" (970). The officers elected were Mr. Smith, president; Mrs. Smith, vice president; Vernon Smith, secretary, and Smith's daughter, Nann A. Smith, treasurer (970).

At the next annual meeting of the Company, held January 14th, 1908, the same board and officers were re-elected. The stock was held as before, namely, 998 shares by Smith, one share by his wife, and one by his son (971). The stock of $100,000 being issued in payment for 52,778 acres of land, the land was capitalized only for about $1.90 per acre, and the stock was of more than face value.

The financial stringency of 1907 affected Smith very seriously. He says: "I was a heavy borrow-

er, owing a great deal of money during the latter part of 1907 and the early part of 1908, and on account of the financial flurry I found myself unable to borrow as much money as I needed, and in many cases to renew obligations which I had" (1335-6). He was a director of the Swedish-American National Bank of Minneapolis—a bank with a capital of $500,000 (1363), and on February 14th, 1908, he was owing the bank upwards of $330,000 (1301). He says * * * "After the panic in the fall of 1907, sometime in the fall or winter, or possibly it may have been in the spring, the records will show that it was decided by the directors that all directors and officers that owed the bank money should put up collateral security for the bank, and I put up in February—I don't remember whether the resolution was passed before the middle of February or not, but the middle of February I put up $30,000 of the stock of the Linn & Lane Timber Company" (1362-3). The records of the Company show that the 300 shares of stock referred to were transferred to the bank on February 14th, 1908 (979-80). The Revised Laws of Minnesota, 1905, Sec. 2863, provide that, "A pledge of stock transferred as collateral security shall be entitled to a new certificate if the instrument of transfer substantially describes the debt or duty intended to be secured thereby. Such new certificate shall state on its face that it is held as collateral security, and the name of the pledgor, who alone shall be liable as a stockholder and entitled to vote thereon." In compliance with this statute there

was issued to the bank on the date referred to a new certificate for the 300 shares reading, "This certifies that the Swedish-American National Bank of Minneapolis is the owner of 300 shares of $100 each of the capital stock of the Linn & Lane Timber Co., which it holds as collateral security for advances and loans made and to be made to Charles A. Smith, pledgor" (979-80).

On February 15, 1908, Smith sold and transferred 15 shares of the stock to Charles J. Johnson, for $21,000 cash, and 150 shares of stock in another company (980, 1274-5). The price indicates that in the sale (assuming the stock in the other company to have been taken at par), the land of the timber company was then valued at $45.50 per acre. The cash consideration represented $26.50 per acre. Smith also on February 28th, 1908, pledged 10 more shares to Charles J. Swanson as collateral for a loan of $5,000 (980-81; 1274; 1224-6; 1335). From this date until October 31st, 1908, the status of the company remained as follows: Smith, owner of 985 shares; Johnson, owner of 15; 300 of Smith's shares pledged to the Swedish-American National Bank for about $330,000, and 10 pledged to Swanson for $5,000.

The financial situation necessitated a "timber bond" issue by one of Smith's companies, the C. A. Smith Timber Company of Marshfield, Oregon, on lands in southwestern Oregon and California (1336). To the amount of $400,000 these bonds were also pledged to the Swedish-American Bank about April 1st, 1908 (1316-17; 1336). But in or-

der to reduce his indebtedness to that bank and meet other obligations Smith wanted these bonds released from the pledge so they could be sold (1361-2). He was then owing the bank $337,240.45, and Johnson, to whom he had sold fifteen shares, was owing the bank $56,450 (1299). To obtain the release, it was arranged on October 31st, 1908, under appropriate resolution on the part of the stockholders and directors of the defendant company that Smith should pledge to the bank additional 210 shares of that company, 208 direct to the bank and one each to B. F. Nelson and C. C. Wyman, who, as trustees for the bank, should go on the board of directors and take respectively the offices of president and secretary; that Johnson should also pledge his 15 shares for his indebtedness, thereby giving the bank 525 of the 1,000 shares and the control of the Company until the debts of both Smith and Johnson should be paid, it being provided that the trustees should have the right to vote the 525 shares (972-94). In the contract with the bank it was said that—"It is intended that the 525 shares thus pledged to the bank, the same constituting more than a majority of the stock of said timber company, shall give the pledgee such control that no indebtedness or liability on the part of the timber company should be contracted without the consent of the pledgee until the indebtedness to the pledgee is fully paid" (990).

The status and stock of the company thereafter remained as last stated, except that on November 28th, 1908, the Northwestern National Bank of

Minneapolis succeeded to the interest of the Swedish-American (994-1000; 1297), and except that partial payments were made to the latter bank so as to reduce Smith's indebtedness to $143,714.95, and Johnson's to $42,950 (1300).

While Heney and Burns were investigating the entries and taking affidavits from the entrymen in January, 1905, Puter, as a result of his threats to have Smith indicted, procured payment of what he claimed due him on the redwood lands in Humboldt county (690), but he became incensed anew against Smith on account of an interview, published in the Minneapolis Journal (787), and from that time on he exerted himself to the utmost to procure the Government to bring suit to set aside the patents. He first published a book under the title of "Looters of the Public Domain" (738), in which he stated that the entries had been made pursuant to an arrangement between himself and Smith; information to the same effect he lodged with the Secretary of the Interior (708, 712), and even called in person on the President (716) and was in attendance on the district attorney aiding and urging the commencement of suit (713). On the stand he was forced to admit that much of the information so given was false, and made for the purpose of securing and hastening the bringing of suit to annul the patents (712, 715-16, 739, 787-8). He succeeded in having this done, and a bill was filed for that purpose in the Circuit Court for the Oregon District on May 25th, 1908 (5-24). To this bill Smith and the persons in whose names he had held the title,

and the entrymen, were made parties, but the Linn & Lane Timber Company was not made a party, probably because the deeds of June 4th, 1906, and August 15th, 1907, from Smith and Werner respectively, conveying the lands to it had not then been recorded.

Although the bill was filed May 25th, 1908, process was not served on Smith until August 11th, the last day for bringing suit under the act of March 3rd, 1891, 26 St. 1093, the patents having been issued August 12th, 1902.

Kribs and some of the entrymen filed a plea to the bill on September 5th (36-40) and Smith and Werner filed a plea on October 8th, 1908 (42-6). These pleas set up the title of the Linn & Lane Timber Company to the land, and were to the effect that this company was a necessary and indispensable party. The Government did not join issue on the pleas or set them for argument, but took *ex parte* orders permitting it to file an amended bill, and pursuant to these orders it filed an amended bill on November 16th, 1908, making the Company a party defendant (49-76). Process was served on the Company on the same day (76-80).

The amended, as well as the original, bill charged Smith and the persons in whose names the title had been held prior to the conveyance to the Company, with conspiring with Puter to procure the entries to be made, and charged that the entrymen had filed pursuant to agreements that the title acquired should enure to the benefit of Smith, etc. Answers were filed by Smith and Werner (82-100)

and by the Company (100-118) denying the conspiracy and all averments of fraud. Both answers furthermore set up that Smith and the Company were respectively innocent purchasers (108, 113) and the Company set up the act of March 3rd, 1891, in bar, the suit having not been brought against it within six years after the dates of the patents (100-1). Replications were filed to these answers July 8th, 1909 (118-121) and the case set for final hearing April 18th, 1910 (121).

At the opening of the trial the Government asked leave to amend the bill by alleging that the value of the land at the time of the issuance of the patents was $225,000, and at the time of the trial $400,000, this with a view to a recovery against the entrymen and the other defendants of a money judgment if the patents could not be set aside. The amendment was allowed provisionally over defendants' objections (122-127). Answer to this amendment was filed by the Company, Smith and Kribs (127-30) and the trial of the case proceeded, part of the testimony being taken orally in open court and part by a special examiner.

In taking the testimony much evidence was admitted under the conspiracy averment, and under the amendment for the recovery of damages, evidence otherwise not competent or material against the defendant company or Smith. The evidence failed, however, entirely to show any conspiracy on the part of Smith, or any one representing him, in connection with the entries; as already pointed out, it appeared affirmatively that Puter did not

bring the land in controversy to the attention of Smith or Kribs until after the entries were made. That no conspiracy on Smith's part was shown was tacitly admitted by the district attorney (796), and no conspiracy was found by the court in deciding the case. In the decision the court, moreover, disallowed the amendment to the bill as to the value of the land and the Government's rights to recover damages (1418), but held all the entries fraudulent and found that Kribs was Smith's agent and had notice of the frauds; that Smith was chargeable with such notice and was therefore not an innocent purchaser. The court also held that the suit was not barred on account of having been commenced against the Company more than six years after the date of the patents (1399-1418). The decision was filed September 12th, 1910, a decree vacating all the patents was entered October 20th (136-43), and from this decree the Linn & Lane Timber Company and Charles A. Smith appealed to the United States Circuit Court of Appeals for the Ninth Circuit, having first taken the usual steps to require the other defendants to join (1419-38). Upon this appeal the decree of the Circuit Court was affirmed by a decree of the Court of Appeals entered May 20th, 1912 (1450-58). From the latter decree the Linn & Lane Timber Company and Charles A. Smith appeal to this court (1458-70).

SPECIFICATION OF ERRORS RELIED UPON.

The appellants, The Linn & Lane Timber Company and Charles A. Smith, assert that the United States Circuit Court of Appeals erred in rendering the decree entered in the above entitled cause on the 20th day of May, 1912, affirming the decree of the Circuit Court of the United States for the District of Oregon, because the decree so affirmed was erroneous in the following particulars, to-wit:

(1) In declaring void, cancelling, annulling and setting aside the twenty-eight patents of August 12th, 1902, described in the decree. This was error because the suit was barred by the Act of Congress of March 3rd, 1891, 26 St. L. 1093, the same not having been commenced against the Linn & Lane Timber Company, the owner of the title granted by the patents, within six years after the date of the patents, as required by said act.

(2) In declaring the deeds and conveyances described in the bill to be in fraud and violation of, and subject to some right of the complainant, and cancelling, annulling and setting aside such deeds and conveyance.

(3) In enjoining and restraining defendant, The Linn & Lane Timber Company, its agents, servants and employees, from asserting, exercising or exerting any authority or control over the lands described in the decree, or any of them, or over or in relation to the title to said lands, or any part thereof, by virtue of the deeds and conveyances of said lands described in the bill.

(4) In declaring the lands described in the decree to be the property of the complainant in fee simple, divested of all right, title or estate in law or equity claimed or asserted by defendant, The Linn & Lane Timber Company.

(5) In declaring that complainant is entitled to the immediate possession of all of the lands described in the decree.

(6) In failing to dismiss the bill. This was error because the suit was barred by the Act of Congress of March 3rd, 1891, 26 St. L. 1093, the same not having been commenced against The Linn & Lane Timber Company, the owner of the title granted by the patents described in the decree, within six years after the date of the patents, as required by said Act.

(7) In not dismissing the bill because of failure to prove the conspiracy charge therein against Charles A. Smith, or Nils O. Werner, or Robert F. Greacen, or Hubert F. Rogers, or Frederick A. Kribs, or John A. Willd, or S. A. D. Puter.

(8) In not dismissing the bill because of complainant's failure to prove that Charles A. Smith, when he purchased the land described in the decree, had notice of some of the alleged conspiracies, frauds or irregularities complained of in the bill in connection with the entries on said lands.

(9) In not dismissing the bill on the ground that Charles A. Smith, for a full and adequate consideration, had purchased the lands described in the decree from the persons who had entered and purchased the same from the complainant, with no

notice or knowledge of any of the alleged conspiracies, frauds or irregularities complained of in the bill in connection with the entries on said lands, but in good faith, believing said persons could rightfully and lawfully sell and convey said lands, and had thereafter, before the commencement of the suit, conveyed said lands to The Linn & Lane Timber Company.

(10) In not dismissing the bill on the ground that the entries of the lands described in the decree had been fully investigated under the direction of complainant's secretary of the interior, by officers of his department, with reference to all the alleged conspiracies, frauds and irregularities complained of in the bill in connection with said entries, and that after such investigation, on the evidence adduced said secretary had determined and decided said entries to be in all respects lawfully made and valid, and had thereupon directed the patents described in the bill and decree to be issued.

(1) In not dismissing the bill as to the land granted by the patent to Sadie E. Puter instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Sadie E. Puter to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89) was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(12) In not dismissing the bill as to the land granted by the patent to Elvira Jacobs instead of

declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Elvira Jacobs to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(13) In not dismissing the bill as to the land granted by the patent to H. C. Barr instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said H. C. Barr to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(14) In not dismissing the bill as to the land granted by the patent to S. A. D. Puter instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said S. A. D. Puter to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(15) In not dismissing the bill as to the land granted by the patent to John J. Jaggy instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said John J. Jaggy to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made

or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(16) In not dismissing the bill as to the land granted by the patent to Neal D. Dozier instead of declaring the patent void. This was error because the evidenec did not show that the duplicate written statement of said Neal D. Dozier to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(17) In not dismissing the bill as to the land granted by the patent to Zebulin Smith instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of Neal D. Dozier to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(18) In not dismissing the bill as to the land granted by the patent to Thomas Wilson instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Thomas Wilson to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(19) In not dismissing the bill as to the land granted by the patent to John L. Green instead of declaring the patent void. This was error because

the evidence did not show that the duplicate written statement of said John L. Green to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(20) In not dismissing the bill as to the land granted by the patent to J. S. Phillips instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said J. S. Phillips to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(21) In not dismissing the bill as to the land granted by the patent to Charles Burley instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Charles Burley to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(22) In not dismissing the bill as to the land granted by the patent to Charles Barr instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Charles Barr to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the require-

ments of Section 2 of said Act.

(23) In not dismissing the bill as to the land granted by the patent to Edward Finley instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Edward Finley to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(24) In not dismissing the bill as to the land granted by the patent to Douglas Adkinson instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Douglas Adkinson to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(25) In not dismissing the bill as to the land granted by the patent to Harry Saltmarsh instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Harry Saltmarsh to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(26) In not dismissing the bill as to the land granted by the patent to Jennie Moulton instead of declaring the patent void. This was error because the evidence did not show that the duplicate writ-

ten statement of said Jennie Moulton to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(27) In not dismissing the bill as to the land granted by the patent to George L. Thompson instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said George L. Thompson to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(28) In not dismisisng the bill as to the land granted by the patent to Isaac R. Borum instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Isaac R. Borum to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(29) In not dismissing the bill as to the land granted by the patent to Benjamin F. Kirk instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Benjamin F. Kirk to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(30) In not dismissing the bill as to the land granted by the patent to Hugh Blakely instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Hugh Blakely to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(31) In not dismissing the bill as to the land granted by the patent to James B. Cooley instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said James B. Cooley to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(32) In not dismissing the bill as to the land granted by the patent to Frank W. Burford, instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Frank W. Burford to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(33) In not dismissing the bill as to the land granted by the patent to John Harrison instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said John Harrison to purchase

said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(34) In not dismissing the bill as to the land granted by the patent to Henry B. Blakely instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Henry B. Blakely to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(35) In not dismissing the bill as to the land granted by the patent to Peter Buffington instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Peter Buffington to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(36) In not dismissing the bill as to the land granted by the patent to Jacob W. Stillwell instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Jacob W. Stillwell to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(37) In not dismissing the bill as to the land granted by the patent to Elam Miller instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Elam Miller to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

ARGUMENT.

What the Courts Below Have Decided in This Case.

The validity of the twenty-eight patents in question was attacked by charging violation of the act under which the lands were purchased ("An act for the sale of timber lands in the states of California, Oregon, Nevada and the Territory of Washington," approved June 3, 1878, 26 St. L. 89). Under this act a citizen, or a person who had declared his intention to become a citizen, was entitled to purchase not to exceed 160 acres of land chiefly valuable for timber or stone at $2.50 per acre, but was required in a sworn application to state, among other things, that the land was unfit for cultivation, was valuable chiefly for timber or stone, was uninhabited, was believed to contain no valuable deposit of certain specified minerals, and that he had made no other application to purchase. In the amended bill it was charged that the applications to purchase were false and fraudulent as respects the quality of

the land and as to the applicants not having made previous applications to purchase (63), but no proof in support of these charges was offered, nor were the qualifications of the patentees as citizens or persons who had declared their intention to become citizens brought in question. The bill, however, charged a violation by each of the patentees of that part of section 2 of the act which required him to state under oath in the application to purchase "that he does not apply to purchase the same (the tract described) on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the United States shall inure, in whole or in part, to the benefit of any person, except himself." The bill alleged, in substance, that each patentee at the time of filing had an agreement with Puter to convey the land to Smith (57-8), and that the agreement was made and carried out pursuant to a conspiracy between Puter, Smith, Kribs and others (51-7). This conspiracy averment was denied (83, 101), and the evidence utterly failed to sustain it. As shown in our statement of the case, the evidence was conclusive that the lands did not come to Smith's attention until about a month after the last entry was made. The attorney for the government admitted this on the trial, stating: "I concede that most of the filings, at least, were made before any negotiations were entered into connecting the

defendants Kribs and Smith with the transaction" (796). The lower courts accordingly could not find and did not find, that Smith, or anyone representing him, had anything to do, directly or indirectly, with the fraud (if any there was) in the entries. The suggestion in the opinion of the Court of Appeals (1452) that Kribs as Smith's agent "was an active participant in the frauds upon the Government" has no reference to this case, but to the other case covered by the opinion (See opinion of the Circuit Court, page 1413). When the Linn and Lane Timber Company was brought in and made a party more than six years after the date of the patents, it was alleged in the amended bill filed for that purpose, in substance, that in May, 1906, Smith had organized that company, and conveyed the lands in question to it without recording the deeds, "to defraud and deceive this complainant and prevent complainant from recovering said lands."

The Circuit Court held that (1) all the entries were fraudulent (1405); that (2) the decision of the Secretary of the Interior prior to the issuance of the patents upon the charges of fraud in the entries then made did not affect the Government's right to have the patents set aside (1413); that (3) Smith was not an innocent purchaser, because "whether (he) had actual knowledge of the fraud or not, Kribs was his agent, authorized to purchase the property, and whatever knowledge Kribs acquired is chargeable to Smith" (1413); and (4) that the act of March 3, 1891 (26 St. L. 1093), was not a bar to the suit, although commenced against

the Linn and Lane Timber Company more than six years after the date of the patents, because "Smith was the corporation and the corporation was Smith" (1414-18).

The Court of Appeals held that (1) all the entries were fraudulent (1452); that (2) Smith could not be regarded as an innocent purchaser because of the knowledge of his agent, Kribs (1452); that (3) the statute referred to was not bar, (a) because "one at least of the purposes for which it (the Linn and Lane Timber Company) was formed was to conceal fraudulently therein the title to the lands which are the subject of the suit and to keep the titles so concealed until the time when the statute of limitation should bar the anticipated suit of the government to set aside the patents" (1454), thereby presenting a case where a court of equity should look through the form to the substance and hold that "the corporation is Smith" (1456), and (b) because the statute did not run from the date of the patents but from the time of the discovery of the fraud.

We will present our views as to the correctness of these conclusions, and take them up in the order stated.

I.

The Evidence of Fraud in the Entries was not Sufficient to Justify a Decree Vacating the Patents.

From the outset the legal and political conception in this country has been that the title of the public domain is held by the Government in trust for the people; and it has been a fixed policy to have the title transferred to the individual citizen as fast as a demand for the use of the lands should arise, either at a nominal cost or entirely free. Generally speaking, it has been the policy to get the lands into the hands of the largest possible number of citizens, and with agricultural lands this policy has been successful. The economic conditions have been in favor of the small farm, and as a result the large grants of agricultural lands to the railroads have been gradually cut up into smaller and smaller holdings. If one should compare settlements where the title has come direct from the Government to settlements where it has been derived through railroad grants, no essential difference would be found in the size of the farms. Congress evidently expected that the lands "valuable chiefly for timber and stone," if parcelled out the same as agricultural lands under the homestead or preemption law, could and would be held and used the same, that is to say, that the patentees, would retain the title and put the lands to their own personal use. But an inexorable economic condition has made this impossible. As a single holding, a

quarter section of timber lands in the mountains of the Pacific States is utterly valueless for the owner's personal use, while it may have a considerable value to the capitalist who can build and operate railroads, saw mills and other equipment necessary for utilizing the timber. Any legislation to diffuse the private ownership of these lands the same as agricultural lands would necessarily have been futile.

The interpretation of the act in *United States v. Budd*, 144 U. S. 154; *Williamson v. United States*, 207 U. S. 425, 460; *United States v. Biggs*, 211 U. S. 507, 525, read in connection with *Adams v. Church*, 193 U. S. 510, and *Hafeman v. Gross*, 199 U. S. 342, is familiar. Any citizen or person who has declared his intention to become a citizen is entitled to purchase 160 acres, but must make oath that he has made no agreement by which the title is to enure to the benefit of anybody else and a fraud on the Government consists in an agreement prior to the application in conflict with this oath, but an agreement to sell may be made any time after the application is on file. The agreement denounced may be so indefinite and vague considering that it is to sell something which has not yet been acquired, that practically speaking, the purchaser is called upon to make oath to his sincerity of purpose—to his mental attitude—for the moment. It is difficult to imagine anything more pernicious in legislation, than thus to tempt people in dealing with their government to make useless, false oaths—tempt them because of the natural

disposition to reconcile intention to interest, and tempt them uselessly because it can make no difference to the Government, either as a fiscal matter or as a policy in favor of a diffused individual ownership, whether the agreement to sell is made the day before or the day after the filing of the application to purchase.

It is a general rule that misrepresentations must have caused some injury to the complainant in order to be material and sufficient cause for vacating a contract (*Atlantic, etc., Co. v. James*, 94 U. S. 207, 214), and if that rule was applicable here, a false statement in the application to purchase as respects an agreement to alienate the title would not be sufficient in equity to warrant the setting aside the patent, considering how utterly immaterial to the Government it is whether or not such an agreement is made before or just after the filing of the application. But it is conceded that the Timber and Stone Act itself defines what is to constitute actionable misrepresentation or fraud in sales under its provisions and what the effect thereof is to be. Section 2, after specifying what is to be stated under oath in the application to purchase, says:

"And if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury and shall forfeit the money which he may have paid for said lands and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void."

It is conceded that by this provision Congress has made every fact required to be stated in the application to purchase equally important, however immaterial some of them may be in themselves, but it is plain, on the other hand, that the statement which is to make void the title acquired must be such as to constitute perjury, hence that it must be wilfully false. The entrymen must swear without reservation that the land is unfit for cultivation and is valuable chiefly for its timber or stone, but Congress manifestly has not intended that an honest mistake of fact in this respect is to make him guilty of perjury. Fraud in the entry depends hence upon the entryman's good faith. If he wilfully misstates the facts upon which his right to purchase depends he commits perjury and the sale is void except as to *bona fide* purchasers; but if he states what he honestly believes to be the facts, he is NOT guilty of perjury and the entry is not in violation of the act.

The entrymen here were all qualified purchasers and the land was of the prescribed quality. The inquiry as to each entryman should, therefore, be whether in view of his connection with Puter and McKinley, he committed perjury in stating that "he had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should enure, in whole or in part, to the benefit of any person except himself."

The district judge, after stating briefly what was done by Puter and McKinley, says: "It is clear that none of the applicants took the land for their own use and benefit, but for the use and benefit of Puter and McKinley." Looking at the matter from the standpoint of Puter and McKinley this is true. But to make this a determining factor on the question of fraud is to charge the entrymen with what Puter and McKinley did, and this should not be done. Their acts are only material in so far as they may tend to show the statements in the applications of the entrymen to have been wilfully false. An entryman making oath to an application to purchase, believing that he is stating the truth is certainly not guilty of perjury, because he happens to be induced to become a purchaser by some one who is scheming to get the land. So we contend that while the acts of Puter and McKinley and their agent Tarpley should of course, be considered in determining whether the entrymen falsely negatived the existence of an agreement to sell, due weight must be given to Puter's testimony that his scheme in connection with these entries (like in another instance described in his book) was to have—

"a clean cut agreement with each locator whereby I was to charge $150 (here $100) as my filing fee, with the understanding that I would find somebody willing to loan $600 on each claim at the time of making final proof the locators agreeing to execute a mortgage on their claims for that amount as security for the loan. This mortgage was to run one year at ten per cent interest annually, and it was

provided further that my location fee was to be deducted from this loan. * * * Under no circumstances whatever were the locators to offer their claims for sale before making final proof and that neither the person advancing the $600 nor myself had any intention of purchasing the lands after the locators had acquired final title. In general terms, I sought to create the impression that good faith was to be observed all around in the transactions involving the acquisition of title to these lands" (745).

Due weight should also be given to Tarpley's testimony that the arrangements with entrymen which he made were made in accordance with this plan (412-13, 416-17, 425-28) and to McKinley's testimony to the same effect as far as he was concerned (587). We feel justified in claiming for the evidence that it shows that Puter planned carefully to so deal with the entrymen that they might truthfully say they had made no agreement to sell, and that McKinley and Tarpley (who made the arrangements with all the entrymen except four, p. 583), endeavored to deal with them in the same way. Of course, they may not have adhered to the plan in all instances; some of the entrymen may in fact have made such bargain with them as to render their application to purchase wilfully false; but in searching for the truth in this respect we should start out from the premise that we have before us a transaction in which clever men endeavored to deal with simple-minded men in such a way that the latter might act in perfect good faith. Insofar

as this was successfully accomplished the entrymen were not guilty of perjury or fraud.

Eleven entrymen and entrywoman were examined as witnesses, ten for the Government, namely, Puter, Wilson, Findley, Phillips, Saltmarsh, Harrison, Moulton (now Mrs. Lovejoy), Henry Blakely and Luella Beeman (now Mrs. Ingersoll), and one, Buffington, for the defendants. Of the other seventeen, two were dead, namely, H. C. Barr and Jaggy, and the rest were not called, namely, Mrs. Puter, Elvira Jacobs, Zebulon Smith, Charles Barr, John L. Green, Charles Burley, Douglas Adkinson, Isaac R. Borum, Benj. F. Kirk, Geo. L. Thompson, Jacob W. Stillwell, Elam Miller, Frank W. Burford, James B. Cooley and Hugh Blakeley.

Six of these entrymen lived at Brownsville, the home of McKinley, namely, Henry W. Blakeley; his son, Hugh Blakeley; John Harrison, Frank Burford, James B. Cooley and Jacob W. Stillwell. We will review briefly the testimony of the two who were called as witnesses, namely, John Harrison and Henry W. Blakeley.

Harrison was working as a painter, had evidently heard that timber claims were being taken and that McKinley was a locator, for he called on the latter and said, "I would like to get a claim" (490), to which McKinley answered, "All right, we run on them sometimes" (490). Later on, Harrison says, "he (McKinley) telephoned me that there were seven claims up above Mealey's that we could get, and I might see some of the rest of the boys and if we wanted them now is the chance to get

them" (490). Harrison thereupon called on Blakeley (338), a farmer and old resident in the neighborhood (336), who had known McKinley several years (337), and told him of his talk with McKinley (338). Blakeley said he wanted one of the claims, and called McKinley up on the telephone and asked him "what there was in them timber claims" (338). McKinley answered: "About $75; there ought to be more than that in it; he didn't know whether there was or not" (338). "If you don't sell me this claim you can sell it to anybody else that will give you the most for it, but you got to pay me the location fee if you let anybody else have it" (348). Harrison says, "When he phoned to us * * * I believe I asked him how much there was in it, or how much I could make out of it. He said there was $75 in it and he didn't know how much more. * * * He says, "Whatever you can make out of it, but," he says, "there was $75 above expenses and government price of the land" (493). McKinley also telephoned that he would meet them at Mealey's (the man who was furnishing descriptions at $10 per quarter section). Blakeley thereupon went around to Burford, Cooley, Stillwell, and his son, Hugh, and told them of this talk with McKinley, and these men with Harrison and his son thereupon went with Blakeley's team to Mealey's where they met Tarpley, who took them into the timber and showed them the corners of the seven claims, designating which one each of them could have (340). They returned home and after a while went together with Blakeley's team to Hal-

sey, the nearest railroad station, to go to Roseburg and file, evidently by appointment with McKinley, for he telephoned Blakeley not to purchase railroad tickets as he (McKinley) was getting special rates (341). McKinley joined them on the train, paid their fares both ways and their hotel expenses, attended to the publication of the notices of final proof and the payment of the publication fees, and probably notified them when to appear at the land office to make final proof (343). They went together again to Roseburg for that purpose, McKinley again paying their expenses. Upon having made proof they executed respectively a note and mortgage running to Kribs to cover the purchase money to the Government, the fees and expenses incurred and the $75 spoken of a location fee. At Roseburg in the evening of the day when the final proofs were made and the mortgage given, six of these entrymen (it does not appear what became of Frank Harrison's entry) discussed between themselves whether or not to sell, some being in favor of selling and some opposed (350, 506-7), and they inquired of one Judd Mealey about selling at a better price than the $75 which they seemed to consider as a standing offer from McKinley (350, 496-7). Mealey said, "he was not in shape to buy" and said to Blakeley "If the rest want to sell I advise you to let yours go" (350). They thereupon determined to let the land go to McKinley, evidently under what they considered his standing offer, and the single men in the party executed deeds before leaving Roseburg and the married men at their homes

at Brownsville a few days later, all deeds running to Willd. In the affidavit which Blakeley made before Stratford, March 11, 1902 (1132, 1136), there are two statements which are not accurate, namely, that he had paid Tarpley a locating fee of $50 (1133), and "I sold the land to Willd" and got for it "about $800." In Harrison's affidavit of the same date (1145-1148) it is said: "I sold it (the land) to John A. Willd" and received for it "near $800." These statements may be criticized for lack of frankness. It is probable that some statement by McKinley about having to pay Tarpley for showing the claims may account for Blakeley's statement that he had paid Tarpley $50; otherwise his affidavit is in effect true. The affidavits they made before Burns, December 29th, 1904 (1213-16), are in accordance with their testimony on the stand, omitting the details. They deny having intended to defraud the Government (367). Blakeley's sincerity is shown by his worry after final proof, lest he might not have been upon the identical quarter section entered when he was in the timber with Tarpley (360). He says he thought at the time that what he did was perfectly legitimate and lawful and adds "but I have thought different since." When Stratford was taking his affidavit "I began" he says, "to wish I had never seen the claim, and have been wishing that ever since (368). I wanted to make some money out of the claim. I was born and raised there. I never used my right. A lot of fellows were coming in and taking up all the time, and I would get in first opportunity" (357). His

sincerity so impressed the district attorney that he remarked to the statement quoted, "Yes, that is all right, I don't blame you for that" (357).

In connection with the testimony of these two men must be considered Puter's plan, already referred to, and McKinley's testimony as to what he did to carry it out, which is as follows:

"That talk (with entrymen) varied a little in cases. Now, there would be like the case of Mr. Wilson there—I had known him a long time, and if I should happen to be a little rushed—I had other business on hand of a different nature, and I was in a hurry on account of those Northern Pacific people being up in there and I knew this was a rush matter—a delay of a day or two might mean that it would knock us out, perhaps, of this proposition, and for that reason why, I was considerably rushed all the way along at the time of the entry. * * * I might have said (to Wilson) 'You go on down and use your timber right' and he would go. I would say 'I have a piece of timber here. You go down and file on it and you can make some money on it. I will act as your agent in the matter and help you all I can and you will get $75 anyway,' and let it go at that and say nothing further about it. There might have been that arrangement made with two or three other parties that I knew well, and I would not go into the details. There were other cases where I would explain about this mortgage."

(After referring to the arrangement between himself and Puter).

"At that particular time when we was talking of it then we was to put this purchase money ourselves there—they thought we were—we would file these people on the land, agree to advance them $75, put in $100 location fee, from $75—$100 as we figured it out—$425 or $435, I think it would cost to obtain title to the land from the Government,

and sum it up all around it would be about $500 —so we called it $600, and Mr. Puter himself told me to go and see these parties, get them under that arrangement and acting along these lines I did that and told a great many of the entrymen that we would take a mortgage for $600; but in no instance —they can't say so, nor no one else—was ever anything said at the time of entry that they should deed the lands over to me or sell them to me or any one else. I knew they would be for sale, but as to myself handling them that was a mere chance. I might be able and some other man might step in at the right moment. Q. * * * Didn't you expect, by reason of the arrangement, that you would probably have the handling and the selling of these lands and the profits there was in them? A. Yes, yes, I can say I did. I can say I did. Q. Didn't you really feel that notwithstanding there was no talk about a sale or anything of that kind * * * in the natural course of events, this title would be disposed of by you eventually? A. Yes, I did. I understood that for several good reasons. These men were—I was acquainted with them, knew the locality of timber, knew who owned timber, on the north, east and the south. I had sold myself hundreds of thousands of acres—two whole townships south of these tracts to my people back east and I thought I would have the first chance. They would naturally give me, as I went ahead and allowed them to make some money out of it, if I would be fair with them all the way through, they would naturally give me the first, the preference right, if the lands were for sale; that when they came to talk sale they would give me the preference right in place of some outsider to handle the lands and if they did I thought I was in position, buying and selling at the time and dealing quite largely—that I could find a buyer either with my people in La Crosse, Wisconsin, or any one outside. Q. When did it first become a matter of discussion between you and Puter to take the deeds at the time of proof, or as soon as you could get the deeds—as soon as they could be obtained? A. On the day of proof.

The day when the parties—the first parties proved up" (585-89).

We shall not undertake to review the testimony of the other entrymen and entrywomen who were called as witnesses, but simply state that a prior agreement to sell is denied by Wilson (259), Finley (282-3), Dozier (329-32), Phillips (460, 465-6), and Buffington (1002-3), and that the testimony of Harrison and Blakeley is, in our judgment, more favorable to the Government than that of any of these five. We concede that the testimony of Mrs. Ingersoll (Luella Beeman), Mrs. Lovejoy (Jennie Moulton) and Harry Saltmarsh made a stronger case of fraud as to their respective claims than did the testimony of Harrison and Blakeley as to theirs. We have reviewed the testimony of Harrison and Blakeley because McKinley asserts that he did not go so fully into details with persons with whom he was well acquainted as with the rest and we think that this is likely to have been the case with Harrison and Blakeley whom he knew well, as they lived in the same village; also because Harrison and Blakeley's testimony carries the conviction that they state their arrangement and understanding with McKinley fully as favorable to the Government as the truth warrants.

The gist of the evidence as to Harrison and Blakeley is this: They were old settlers in the vicinity of these lands; found that timber claims were being taken up through McKinley; had never exercised their rights to purchase under the Timber

and Stone Act; felt they had the right to avail themselves of the privileges of that act; inquired of McKinley to ascertain whether they could get a chance to do so and whether it would be worth while; were given to understand that he would locate them and advance on the security of the land the costs and expenses and sufficient to give them $75 in money, the mortgage also to cover $75, which would be his location fee if they kept the land or sold it to others but the purchase price, in addition to the costs and expenses advanced, if they should sell it to him, they to be at liberty to sell it to others or keep it as they might see fit.

Upon this state of facts were Harrison and Blakeley guilty of perjury and fraud when they verified the application to purchase? We think this should be answered in the negative.

The arrangement to mortgage the land for the purchase money and expenses connected with the entry is not forbidden (*Hafemann v. Gross*, 199 U. S. 342). "All that is denounced is a prior agreement, the acting for another in the purchase" (*United States v. Budd*, 144 U. S. 154, 163). If the entryman takes the oath in good faith in the sense that he is purchasing for himself and not for anybody else, he is not guilty of perjury or fraud. Blakeley and Harrison could do this notwithstanding statements from McKinley indicating a standing offer to purchase, and so could the others who did not even put that interpretation upon what he said.

It may be that the entryman who may have understood McKinley to make a standing offer to purchase, and who had determined in his own mind that he would avail himself of it, could not in good faith take the required oath, but the evidence does not show this to have been the case with any of the 28 entrymen, except, possibly, Luella Beeman, Jennie Moulton, Harry Saltmarsh and Puter himself. In the light of Puter and McKinley's plan and method of dealing with the entrymen, the action of all, except, possibly, the four named, is consistent with good faith, and fraud should not be imputed. It is especially true of those who were not called as witnesses, for instance, Mrs. Puter. As to her the evidence is simply that she filed January 19, proved up April 18, conveyed April 23, and that she is the wife of S. A. D. Puter. She may be the best of women and may have taken the oath with scrupulous honesty. The district attorney no doubt had reasons for calling such witnesses as Mrs. Beeman and omitting to call such as Mrs. Puter. It is safe to infer that he called those whose testimony would furnish the strongest proof of fraud. The evidence of fraud in cases of this kind "must be clear, unequivocal and convincing," and not "a bare preponderance of evidence that leaves the issue in doubt" (*Maxwell Land Grant Case*, 121 U. S. 325, 380; *Colorado, etc., Co. v. United States*, 123 U. S. 307, 321; *San Jacinto Tin. Co. v. United States*, 125 U. S. 273, 299; *United States v. Budd*, 144 U. S. 154, 161; *United States v. Stimson*, 197 U. S. 200, 204). The evidence of fraud, at least as

to twenty-four of the entries, does not come up to this requirement.

II.

The Question of Fraud in the Entries was Conclusively Decided by the Secretary of the Interior.

In our statement of the case we have shown that the General Land Office was informed as early as February 26th, 1900, that Puter and McKinley were connected with the entries. Whether this connection was such as to make the entries fraudulent was thenceforth under investigation by the Land Department until the Secretary of the Interior on May 17th, 1902, relieved the entries from suspension and directed patents to issue. The principal facts disclosed by the evidence before the Circuit Court from which fraud on the part of the entryman might be inferred were before the Secretary (832-845). Special Agent Mathers had reported that the entries were made "at the instance of one Horace G. McKinley of Wisconsin, who was acting in the interest of Stephen Puter of Portland" (806) and that he (Mathers) had been informed by the entrymen "that McKinley had induced them to make the applications, promising to pay all expenses, and after entry was made either to buy the land himself or find a purchaser for it, so that the entrymen would make $40 or $50 a piece and perhaps more, from the transaction" (824). Strathford had reported as the result of his investigation that "I am frank to

say that I have some reason to believe that every one of these entries were and are fraudulent" (1186). Green had reported that—

"The financial agent of this man (Willd) was Frederick A. Kribs of Portland, Oregon; the cruiser was Horace G. McKinley, who was also the locator and induced the entrymen to take up the lands, representing to them that a mill company stood ready to take them off their hands as soon as final proof could be made and that he wanted only such applicants as would be ready to sell when the time came. * * * In 28 of the 67 cases referred to in this connection the lands were mortgaged to Kribs on the day of final proof; eight tracts were mortgaged to him one day after final proof and one tract three days after proof. Twelve tracts were deeded straight to Kribs on the day of proof and 28 tracts were deeded to Willd within five days after proof" (918-9).

Green had also furnished transcripts from the county recorder's office of the mortgages and deeds executed by the entrymen (834, 919-920). The Secretary's decision (832-845) shows knowledge and due consideration on his part of the facts and circumstanecs from which fraud might be inferred. The case is, therefore, we think, within the rule laid down by this court in *United States v. Throckmorton*, 98 U. S. 61, governing the conclusiveness of decisions of this character and their binding force on courts. In the case of *Johnson v. Drew*, 171 U. S. 93, the court, speaking by Justice Brewer, said (p. 99):

"But whether a party was or was not in possession of a particular tract at a given time is a question of fact, depending upon parol testimony; and if there is any one thing respecting the administra-

tion of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts. The law in reference to this matter was summed up in the case of *Burfenning v. Chicago, St. Paul, etc., Railway*, 163 U. S. 321, 323, as follows: 'It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony, and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts except in those cases of fraud, etc., which permit any determination to be re-examined. *Johnson v. Towsley*, 13 Wall. 72; *Smelting Company v. Kemp*, 104 U. S. 636; *Steel v. Smelting Company*, 106 U. S. 447; *Wright v. Roseberry*, 121 U. S. 488; *Heath v. Wallace*, 138 U. S. 573; *McCormick v. Hayes*, 159 U. S. 332.'"

See also *Greenameyer v Coate*, 212 U. S. 434.

The decision of the Land Department in a matter properly before it is as conclusive upon the Government as it is upon the individual. *United States v. White*, 17 Fed. 561.

If it be suggested that Strathford, the special agent, was corrupted, and that the decision of the Secretary for that reason does not come under the rule in the *Throckmorten case*, the answer is that while his actions in soliciting and receiving small loans from Kribs (1031-3) were reprehensible in

the highest degree in point of propriety, his report December 28th, 1901, asking to be relieved (827), and his final reports, recommending the cancellation of several of the entries covered by his investigation (838), and proffering a like recommendation as to the 28 here involved if the Commissioner of the General Land Office should so desire (1186) show that his action was not influenced to the prejudice of the Government; and, furthermore, there is no charge in the bill that he was corrupted, or that the decision of the Secretary was induced by his misconduct. All the bill contains on that subject is found in the amendment of August 6th, 1910, where it is averred that some of the defendants "secured the respective entrymen and entrywomen * * * to execute and subscribe affidavits and depositions in which it was falsely set forth and represented, in effect, to the complainant that each of said entrymen and entrywomen respectively had entered the land in good faith," etc. (134). Granting that the affidavits referred to were not in all respects accurate, the rule is, that notwithstanding false testimony, or forged documents "the decision of the proper officer of the department is in the nature of judicial determination of the matter in dispute." *Vance v. Burbank*, 101 U. S., pp. 514-519.

If for any reason the decision of the Secretary can be said not to come within the rule in the *Throckmorton case*, the investigations of the land department and the decision of the Secretary of the very questions now litigated should certainly have persuasion probative value in support of the validity

of the entries. What was known or plainly suggested to the Land Department before the patents were issued, a court of equity should not consider a fraud on the Government. It is so held by this court, in the case of *United States v. San Jacinton Tim. Co.*, 125 U. S. 273. In that case a forgery was the fraud charged and Justice Miller said (p. 299): "We consider this examination of the case in the office of the Commissioner and its re-examination by the Secretary of the Interior as possessing the very strongest probative force in regard to the question of fraud which was mooted before them."

III.

Charles A. Smith was a Bona Fide Purchaser From the Patentees.

Attention has already been called to the fact that Kribs went to the Coast on his own behalf about February 1st, 1900 (1009), and engaged in purchasing timber for himself and for various persons other than Smith (1011, 1052, 1055-6); that at the time of his departure he had an understanding with Smith to the effect that he would keep Smith informed of opportunities to buy timber lands and that if Smith should avail himself of such opportunities Kribs' compensation for his services should be based upon the acreage acquired (1009-10) and that this compensation was afterwards fixed at 27½ cents per acre (849-52, 1052). When in March, 1900, it was arranged between Puter and Smith that Kribs should go to Oregon and exam-

ine the lands, Kribs' authority to purchase was probably implied, but the terms of the agency as respects Kribs' compensation were in accordance with the arrangement referred to. Kribs, as we have seen, came to Oregon on April 1st (474, 542, 1015), met McKinley and examined the lands, then took up negotiations with Puter resulting in his agreeing to make a loan of $600 to each entryman to be secured by mortgage and later he agreed to buy the lands at $5.25 per acre. The last deeds were taken May 19th (1443). Smith was 2,000 miles away. He returned east after the meeting between the parties in San Francisco in March and did not come back to the coast until May 21st (710, 774, 1341-4). He then ascertained that the lands were not patented and he knew nothing about the details of Kribs' and Puter's negotiations, and nothing about Kribs' having furnished money to prove up or that mortgages had been taken (1353-5). The evidence is uncontradicted that Smith personally had no notice or knowledge of any fraud, or of anything indicating fraud, in connection with the entries (1345-47). The price of $5.25 per acre was full value, and was more than what it would have cost to get similar lands by scrip (597-8, 1033-4, 1337-8, 1365-6). Kribs testifies that he acted on advice of attorney and that he took the mortgages and deeds in good faith (1022, 1025), but the district judge after reviewing the evidence (1407-13), concludes that his knowledge of the Northern Pacific contest, of McKinley's arrest, etc., was sufficient notice to him of the frauds on the part of the

entrymen as found by the court. "It may be true," says the judge, "that Smith, his principal, had no actual knowledge of such frauds, although the evidence would be more satisfactory upon that point if the correspondence between himself and Kribs and Puter concerning this transaction had not all been destroyed about the time the matter was being investigated by a federal grand jury and it was rumored or reported that Smith and Kribs were liable to be indicted and that the Government was contemplating bringing a civil suit to cancel and set aside the patents. But whether Smith had actual knowledge of the frauds or not Kribs was his agent authorized to purchase the property and whatever knowledge Kribs acquired was chargeable to Smith. I conclude, therefore, that Smith was not a *bona fide* purchaser for value and without notice of the fraud and cannot claim the right to such in this suit" (1413). The judge inadvertently makes the statement that correspondence with Puter was destroyed for the record shows that every letter and telegram called for was produced and many of them were put in evidence by the Government. The facts are, as shown by the record and the extract from the decision quoted, that so far as Smith personally is concerned the purchase was in perfect good faith and the lower courts held him not to be a *bona fide* purchaser only because they considered that there was sufficient notice to his agent and that Smith was chargeable with that notice.

We believe the lower courts erred in applying to this case the rule that notice to the agent is notice to the principal. The rule rests on the presumption of fact that the agent has warned the principal against everything known to his disadvantage. But the rule has no application when the transaction is of such character that the interest of the agent conflicts with that of the principal. The agent is not presumed to impart information which it is for his own interest to conceal. The exception to the rule is stated by Judge Sanborn in *Pine, etc., Co. v. Bailey,* 94 Fed. 258, p. 261, as follows:

"In consonance with this principle of the law of agency, the rule that notice to the agent is notice to the principal has an exception as well established as the rule itself. It is that when the agent acts for himself, in his own interest, and adversely to his principal, in a given negotiation or transaction, neither notice to nor the knowledge of the agent can be lawfully imputed to the principal. *Surety Co. v. Pauly,* 170 U. S. 133, 156, 18 Sup. Co. 552; *Frenkel v. Hudson,* 82 Ala. 158, 2 South. 758; *Waite v. City of Sanata Cruz,* 89 Fed. 619, 630; *Barnes v. Gaslight Co.,* 27 N. J. Eq. 33, 37; *Winchester v. Railroad Co.,* 4 Md. 231, 241; *Davis Improved Wrought Iron Wagon Co. v. Davis Wrought Iron Wagon Co.,* 20 Fed. 699, 702; *Thomson-Houston Electric Co. v. Capital Electric Co.,* 56 Fed. 849, 853; *Bank v. Cunningham,* 24 Pick. 270, 276; *Mechem. Ag.,* Sec. 723. The reason of the general rule is that it is the duty of the agent to communicate to his principal the facts relative to any transaction in which he acts on his behalf, and that the law presumes that he has discharged his duty. But when the nominal agent commences to act in his own interest, and adversely to his principal, the presumption no longer obtains that he will communicate to him facts which might prevent the consummation of the negotiation which he is conduct-

ing on his own behalf, and the counter presumption that he will conceal them arises. As the reason for the rule no longer exists, the rule ceases to apply, and the exception prevails."

In the case cited from 170 U. S., page 156, Justice Harlan says:

"The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf."

Kribs' interest in having the largest possible acreage purchased and his position as the entrymen's mortgagee bring the case within the exception. The compensation for services—his profit from the transaction—depended upon the lands being purchased. His position in this respect was what the position of a broker for the entrymen would have been. The money which he had received from Smith and deposited in bank to his own credit he had used without authority in making loans on mortgages running to himself. If the title of the entrymen was defective the loss would fall on him, unless the lands were sold on terms that would liquidate and satisfy the mortgages. A sale of the lands to Smith was to him 27½ cents per acre, or $1,232; no sale meant nothing. A sale meant that mortgage loans

for about $15,000 would be paid; no sale meant that he would have to account for the money used in making the loans and suffer a heavy loss if the titles proved defective. The conflict of interest was here more real and substantial than in most of the cases which are held not to come under the rule of a presumed communication of notice because of the adverse interest of the agent.

The presumption when the agent is not adversely interested, is indulged in as a matter of policy and can, therefor, not be contradicted. A person is charged with notice to his agent the same as he is charged with notice of public records. It is merely constructive notice.

It, therefore, becomes material to inquire whether the saving clause in the Timber and Stone Act in behalf of *"bona fide* purchasers" should be construed strictly and technically so as to charge the purchaser with constructive notice, or whether it should receive the same construction that has been given to similar language used in all other acts of Congress designed for the protection of purchasers.

In construing the term *"bona fide* purchaser" as used in the Act of March 3, 1887, and also in the Act of March 2, 1896, this court in the case of *United States v. Winona, etc., Railroad,* 165 U. S., at page 477, said:

"It is earnestly contended by the Government that the present holders of the title are not *'bona fide* purchasers'; that that term has a fixed and well defined meaning as announced in the frequent decisions of this and other courts; that, as said in 2 *Pomeroy Equity Jurisprudence,* paragraph 745, the

essential elements which constitute a *'bona fide* purchaser' are, therefore, three—a valuable consideration, the absence of notice and the presence of good faith; * * * that while two of these essential elements may be found, to-wit, a valuable consideration and the presence of good faith, the third, the absence of notice is lacking; that all men are conclusively presumed to know the law; etc. * * * We are unable to agree with this contention of counsel for several reasons: In the first place the situation as it was known to exist makes against any such narrow construction. While instances of such fraudulent conduct on the part of the state to which the lands were certified, or the company to which the lands were patented, might exist, yet in the nature of things they would be few and hardly worth the special notice of Congress, while on the other hand, the fact that there had been a difference between the land department and the courts, one construction obtaining in the former prior to the decisions by the latter, and the further fact that by this difference of construction many tracts had been erroneously certified or patented, must have been well known to Congress, and naturally therefore a subject for its legislation. Further, there was no need of any legislation to protect a *'bona fide* purchaser.' This had been settled by repeated decisions of this court. *United States v. Burlington & Missouri River Railroad Company*, 98 U. S. 334, 342; *Colorado Coal Company v. United States*, 123 U. S. 307, 313—reaffirmed in *United States v. California, etc., Land Company*, 148 U. S. 31, 41. For in each of those cases it was decided that, although a patent was fraudulently and wrongfully obtained from the Government, if the land conveyed was within the jurisdiction of the land department, the title of a *'bona fide* purchaser' from the patentee could not be disturbed by the Government, so that this provision was absolutely unnecessary if that which is now claimed by counsel for the Government is all that was intended by Congress. We do not mean to assert that because legislation to cover such a contingency was unneces-

sary, therefore the language used by Congress necessarily implies something other and different, because of course it may have been that Congress intended nothing but a simple declaration of the law as it was known to exist. At the same time the fact, that under one construction it was needless, raises a presumption that something more was intended, and that Congress had in view the protection of other parties than were already protected by general law."

And further on at page 481 the court adds:

"These being the provisions of the Act of 1887, the Act of 1896 confirming the right and title of a *bona fide* purchaser, and providing that the patent to his lands could not be vacated or annulled, must be held to include one who, if not in the fullest sense a '*bona fide* purchaser,' has nevertheless purchased in good faith from the railroad company."

In *United States v. Southern Pacific Railroad Co.*, 184 U. S. 49, the court again announced similar views and held that constructive notice did not prevent a purchaser from being a "*bona fide* purchaser" under the statutes referred to.

Language used in the Acts of Congress for the protection of innocent purchasers has always been liberally construed. This is strikingly illustrated in the case of *Fee v. Brown*, 162 U. S. 602. That case involved the location of a certificate of Chippewa scrip on a tract of land in Colorado and the validity of a patent erroneously issued on the location. Under the Act of Congress the scrip could only be located on the original reservation in Wisconsin; locations made elsewhere had been held void by the courts. Congress passed an Act authorizing purchasers of land located by scrip out-

side the reservation in Wisconsin to perfect their title by paying the government price, provided, that the Secretary of the Interior should find that they were "purchasrs in good faith." It was earnestly contended that inasmuch as the patents were void on their face and issued in violation of the Act of Congress, the holders of the scrip title could not be deemed "purchaser in good faith." The court said:

"Strictly speaking, no person who had located this scrip, except the half-breeds themselves, could be said to be purchasers in good faith, since they were apprised by the treaty and the act of December 19, 1854, that the scrip could only be located within the ceded territory by the beneficiaries therein named, and that such scrip was incapable of alienation. Congress, however, was evidently moved to use these words by the fact that this scrip had been misused by designing parties, etc. * * * But we are satisfied that it was not the intention of Congress to give it that narrow construction and that it adopted a course which, partially at least, protected the holder of the land and at the same time insured to the government a proper compensation for them."

Referring to the term *"bona fide* purchaser" as used in the second section of the Timber and Stone Act, it may well be said ,as was said by Judge Brewer in the *Winona case* above cited, that the use of the term was entirely unnecessary for the purpose of saving the rights of *bona fide* purchasers of patented lands. It has been a rule applied in every case that has been before the courts for more than a century that a purchaser from the patentee of the Government was protected if his purchase was *bona fide,* the saving clause in the Timber

and Stone Act being entirely unnecessary to protect one who is a *bona fide* purchaser in the technical sense; its presence, as suggested by Judge Brewer, "raises a presumption that something more was intended and that Congress had in view the protection of other parties than were already protected by the general law," and such has been the construction given to the term as it occurs in the Timber and Stone Act in several cases before this court.

In the case of *United States v. Detroit Lumber Co.*, 200 U. S., p. 321, lands had been acquired under the Timber and Stone Act by money furnished by the Martin-Alexander Co. and conveyance had been made to it of the timber by the entrymen as the entries were made. The lands thus acquired were on the 14th day of January, 1901, bargained to the Detroit Company, another corporation, but the written contract of sale from the Martin-Alexander Co. was not executed till March 1st, 1901. On the 14th day of January, 1901, Martin, who had been president of the Martin-Alexander Company during the acquisition of title to the lands became the president of the Detroit Company and was its president at the time of the consummation of the sale to the latter company on March 1st, 1901. It was argued by the Government that Martin, as chief executive of the Detroit Company, was chargeable with knowledge of the fraud by which the lands had been acquired, that in asmuch as he had knowledge of this fraud before the written contract for the transfer of the lands was entered into, he and the Detroit Company had constructive

notice of the wrongful character of the entries. This would certainly have been true if the protection given *"bona fide* purchasers" by the Timber and Stone Act had been strictly construed, because no rule is better settled than the one that notice (actual or constructive) of the infirmity in the title brought home to the purchaser before conveyance, or before final payment of the purchase money, is fatal to the *bona fides* of the transaction. This court refused to hold that constructive notice of that character was sufficient to destroy the *bona fide* character of the transfer and said, quoting from 6 Wall. 90:

"A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to *Sugden on Vendors*, p. 622, where he says: 'In *Ware v. Lord Egmont*, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

The court says:

"In the light of these authorities we see nothing which casts any imputation on the conduct of the Detroit Company or that tends to show that it was not a purchaser in absolute good faith."

Under the strict application of the rule governing *bona fide* purchasers, the title transferred, to protect the purchaser, must be the legal title. Pomeroy (II Equity Jurisprudence, par. 753), says:

"The rule is universal and elementary, that if a purchaser in any form receives notice of prior adverse rights in and to the same subject-matter, before he has completely acquired or perfected his own interest under the purchase, his position as a *bona fide* purchaser is thereby destroyed, even though he may have paid a valuable consideration."

"In the Detroit case last cited it was strenuously contended that inasmuch as the legal title was outstanding in the Government (no patent having issued) at the time of the transfer from the Martin-Alexander Company to the Detroit Company, there could be no *bona fide* purchase. But the court, applying the doctrine of relation, held that the conveyance prior to patent did not prevent the grantee from being considered a purchaser in good faith. Later, in the case of the United States vs. Clark, 200 U. S., 601, this court affirmed the ruling in the Detroit case that the grantee is regarded as a *bona fide* purchaser under the saving clause in the Timber and Stone Act, although he acquired only the equitable title of the entrymen at the time of the purchase, no patent having been issued. In that case the court also said, page 607: "The United States is attempting to upset a legal title. In order to do that it must charge Clark with notice of the original fraud * * * actual notice must be proved."

In the light of the language used by this court and the facts before the court in the two cases last referred to, we believe the principle to be deduced may be stated as follows: In a suit in equity brought by the Government to vacate a patent issued under the Timber and Stone Act, on account of the entryman's fraud, against a party holding the legal title who has bought the land in good faith and paid a valuable consideration, without *actual* notice or knowledge of the alleged fraud, it is not sufficient to overcome the legal title and the equities of the holder to merely establish a state of facts which in other cases involving notice or priority would constitute constructive notice. In other words, the purchaser of a title evidenced by the Government's patent should not be deprived of his property at the suit of the Government on a mere *technical* rule of constructive notice. To entitle the Government to have the title set aside and the patent vacated it must be shown that the purchaser was actually guilty of bad faith in making the purchase, or that he was guilty of "an act of gross or culpable negligence" in not ascertaining the existaece of the fraud affecting the title.

IV.

The Suit Was Barred by the Act of March 3, 1891, 26 St. L. 1093.

In reaching the conclusion that the Act was not a bar, the lower courts find or assume as facts what we earnesly contend are not facts, and these parts of the opinions we will discuss first.

A.

AS TO THE IDENTITY OF SMITH AND THE LINN AND LANE TIMBER COMPANY.

The district judge held that the holder of the legal title is an indispensable party; that he is not made a party until process is issued against him and left with the marshal for service; that the suit had to be brought within six years after the date of the patents and was not brought within that time against the Linn and Lane Timber Company. "But," he says, "the identity of Smith and the Linn and Lane Timber Company and their relation to the title to the property in controversy is such that I do not think the rule should be applied in this case. Smith is the real party in interest and the beneficial owner of the property. The corporation was organized by him as a mere holding concern. He owned all of its capital stock and the members of his family composed the board of directors and were the officers of the corporation. In fact, Smith was the corporation and the corporation was Smith" (1415).

We contend that a wholly mistaken view of the facts as well as of the law is here expressed, and we will endeavor to point this out by showing (a) the law under which the Company was organized, (b) what was done to organize under that law, (c) what business was thereafter transacted and what interest others than Smith had acquired in the Company at the time the suit was brought, and (d) the law, generally, as to the separate entity of corporations.

(a) *The law under which the Company was organized.*

In Minnesota all private corporations have to be organized under general laws (Const. Art. 4, sec. 33). The requirements of these laws (Chap. 58, Revised Laws 1905) are that "any three or more persons" shall subscribe and acknowledge a certificate stating the name, the general nature and principal place of the business, the period of duration, the names and places of residence of the incorporators, the board of directors, the names and addresses of the persons who are to constitute the board until the first election, the time when the annual elections are to be held, the amount of the capital stock, the denomination of the shares, the highest authorized indebtedness (sec. 2849); this certificate must be recorded with the secretary of state and register of deeds of the county (sec. 2850), published twice, and "upon filing with the secretary of state proof of such publication, the

(its) corporate organization shall be complete" (sec. 2851). The directors must be at least three in number (sec. 2858); there must be a president, secretary and treasurer, and the president must be a director (sec. 2859); and the capital stock must not be less than $10,000 (sec. 2868). The usual powers are conferred on corporations so organized (sec. 2852); they "may establish offices and conduct business in any other state or country" (sec. 2870). When the certificate of incorporation is recorded and published and the incorporation fee paid to the state, the secretary of state, if requested, must issue a certificate showing among other things "a compliance with all prescribed statutory provisions, and that it is duly organized and exists as a corporation under the name and of the kind specified, with the powers, rights and privileges, and subject to the limitations and restrictions pertaining thereto; such certificate shall be *prima facie* evidence of the facts stated therein" (sec. 2874).

This is all that is required to bring into existence a *de jure* corporation under the laws of Minnesota. It will be observed that "any three persons" may be the incorporators. It should also be noted that no prerequisite as to the subscription of stock is required. The capital stock (if such can be considered to exist before shares are issued) is owned and held until issued by the corporation itself. The statutes contemplate a corporation with all its attributes before a single share is subscribed or issued. This may be seen from sec. 2875 which

provides for a first meeting of the corporation on notice from one to the other incorporators "and to each subscriber, *if any*, to its capital stock"; and there is no room for claiming that persons *sui juris* are not qualified as incorporators because they belong to the same family.

The laws of Minnesota contain no provision in any way indicating how the stock in a corporation is to be held except what is referred to in the statement of the case concerning the pledge of shares and a statement in sec. 2858 that the directors are to be elected "by and from the stockholders or members." It is the well settled law of the state that the shares are personal property (*Puget Sound Nat'l. Bank v. Mather*, 60 Minn. 362), and that though there be only one stockholder, the corporate entity remains so distinct and separate from that stockholder that his deed casts not even a cloud on the corporation's title to its lands (*Baldwin v. Canfield*, 26 Minn. 43). Speaking of Minnesota corporations, the Supreme Court of the State in *Aldrich v. Press Printing Co.*, 9 Minn. 123, 126, says that they "may be composed of one man or several." In *Gallagher v. Germania Brewing Co.*, 53 Minn. 214, two persons who held all the stock of a corporation sought to set off their own demands in a suit brought against their corporation by an insolvent plaintiff. The court held that the distinction between the corporation and the holders of its stock was such that this could not be done, even in equity. Says the court:

"To allow the set-off here, it is necessary to wholly ignore the legal doctrine, or fiction, whichever you may call it, that a corporation is an entity separate and distinct from the body of its stockholders and to treat it as a mere association of individuals who are the real party in interest. In dealing with the rights of creditors and the obligations existing between the corporation and its shareholders by reason of their contract of membership, undoubtedly the courts often find it necessary to consider the real parties in interest as the individual shareholders; but it may be laid down as a rule that, except in such cases, it has been found absolutely essential, for the administration of justice, to treat the corporation as a collective entity, without regard to its individual shareholders. In no other way can the title to corporate property be kept free from complication and uncertainty. The transferable nature of stock in a corporation is also a good reason why the theory of a corporate entity should be preserved and why it is necessary to discriminate sharply between corporate rights and obligations and those of shareholders personally. If the rights or liabilities of a corporation could be affected by the acts of the stockholders, except when acting in the corporate name, or if shareholders could set up their several equities against persons having claims against the corporation, or, conversely, if claims in favor of the corporation could be set off against claims against individual stockholders, it can easily be seen into what confusion and chaos corporate affairs would inevitably fall." * * *

"Illustrations might be multiplied indefinitely to show that to recognize any such right would result in the worst sort of complications and that the only safe or sound rule is to adhere strictly, in such case, to the doctrine of a corporate entity distinct from the individual stockholders."

(See also *Winona, etc., Co. v. St. Peter, etc., Co.*, 23 Minn. 359; *Erickson v. Revere, etc., Co.*, 110 Minn. 443.)

(b) *What was done to organize the Company under the laws of Minnesota.*

On May 23rd, 1906, the necessary three persons subscribed and acknowledged a certificate containing all the statutory requirements (949-50). The general nature of the business was not stated to be that of being "a mere holding company for Smith," but "to buy, hold and sell timber and other lands and tenements in the United States of America, and to conduct forestry, mining and agricultural operations on the same; to carry on logging operations, and buy, sell, store and transport logs and other forest products for itself and others; to build and operate mills for the manufature of lumber and other wood and forest products," etc., etc. (949). That the law of the state was in all respects complied with was shown by the official certificate of the secretary of state, issued May 31, 1906, stating that "Charles A. Smith, Johanna A. Smith and John Lind, their associates and successors, are legally organized and established as, and are hereby made, an existing corporation under the name of Linn and Lane Timber Company, with the powers, rights and privileges and subject to the limitations, duties and restrictions which by law, appertain thereto" (393-4).

(c) *What business the Company transacted and what interest others than Smith acquired before the suit was commenced.*

The incorporators, who by the terms of the certificate of incorporation, constituted the first board of directors, held their first meeting June 9, 1906, having first subscribed for one share of stock each, so as to comply with the law requiring directors to be stockholders (967). The first business transacted was the election of officers and the adoption of a corporate seal (968); the next was by appropriate resolution to accept three deeds from Smith in payment of its capital stock, 998 shares of which to issue to him and one share to each of the other two directors (979). The three deeds were United States Exhibit 155 (925-37) for 41,967 acres in Linn County (1251), Defendant's Exhibit C (1384-87) for 7,440 acres in Douglas County (1551) and Defendant's Exhibit D (1388-91) for 3,371 acres in Lane County, Oregon. The first mentioned deed covered the 4,480 acres involved in this suit, although the legal title to these lands was then held by N. O. Werner.

It is said in the opinion of the Court of Appeals, referring to these three deeds, that "no minutes or other testimony are offered to show that the proposition (to deliver them to the company for its capital stock) was accepted." The court must have overlooked the resolution adopted which reads, "On motion of Mr. Lind, seconded by Johanna A. Smith, the proposition was accepted by unanimous vote

and the president and secretary were directed to issue and deliver certificates of the entire authorized capital stock in accordance with the terms thereof" (968-9). Although the Court of Appeals says in its opinion, on page 1453: "that the legal title to all of the land passed to the Linn & Lane Timber Company by virtue of the deeds executed is undisputed," yet it seems to have been in doubt as to whether the deeds were delivered, for it says, on page 1453, "no minutes or other testimony are offered to show * * * that the deeds were delivered." But the minutes and testimony do show that the corporation was named the Linn & Lane Timber Company because most of the timber lands which it was intended that it should acquire were situated in Linn and Lane counties (1328); that Charles L. Trabert, connected for many years with Smith's business (1267), was instructed by Smith to prepare deeds to the Company for the lands in Linn, Lane and Douglas counties (1286); that Trabert carried out these instructions with the assistance of the stenographer, Ethel Steel, and in so doing prepared a deed for the land in each of the three counties and carefully computed the acreage contained in each so as to apportion the consideration to be received, and make the total $100,000, the amount of the Company's capital stock (1251-1271); that the deeds were completed and executed by Smith and his wife June 4th, Trabert acting as a witness and notary (1270); that Trabert, as well as Smith, was present at the meeting of the board June 9th (1269), when, as al-

ready state, "Smith laid before the board deeds to the Company * * * and a proposition to deliver the same to the Company * * * and accept as full consideration * * * the entire authorized capital stock of the Company * * * certificates for such stock except two shares subscribed by Johanna A. Smith and John Lind to be issued to him, and the two shares subscribed by Johanna A. Smith and John Lind to be issued to them, respectively, as fully paid"; that with the deeds so before them, the board passed the resolution accepting the deeds and authorizing the issuance of the stock; that the certificates for the stock were issued June 11th (979), and that the deeds were placed by Trabert in a file-envelope marked, "Linn & Lane Timber Company," containing the Company's incorporation papers or charter (1268; 1270-1).

No particular form of delivery is required, but a word, act, or both, indicating an intention of the grantor to have the deed take effect and divest him of the title constitutes delivery (9 *Am. & Eng. Enc. of Law,* 155 and cases cited). When Smith, with the deeds before the board, offered to deliver them for the stock and the board accepted the offer and authorized the issuance of the stock and Smith thereupon took the stock and through his employe had the deeds placed and kept in the receptacle provided for the Company's papers, he intended, of course, that the deeds should operate as a conveyance to the Company. That such was his intention appears not only from what is stated, but

from other transactions to which we shall now call attention.

Under the statutes of Oregon a foreign corporation cannot do business in that state until it has filed a declaration of its purpose, containing detailed information concerning its organization, and has also appointed a resident agent (*Lord's Oregon Laws*, sec. 6726). The minutes of the board for June 9th, 1906, show that immediately after accepting the deeds, the board resolved to comply with these provisions of the Oregon laws (969). The declaration was executed by Smith as one of the officers on the same day, and was filed with the secretary of state, together with the required copy of the certificate of incorporation and of the appointment of the agent on June 25th (942-63). The secretary thereupon issued to the Company the statutory certificate (1395-98).

Had a delivery of the deeds not been intended by Smith, there would have been no purpose or object in qualifying the Company as a foreign corporation, authorized to do business in Oregon, and in paying the license fees incident thereto.

This shows plainly that Smith at this time considered that the deeds had been delivered and divested him of the title.

By a deed dated and acknowledged August 15th, 1907, Werner conveyed the legal title to the lands involved direct to the Company (945-7). The evidence did not disclose the particulars attending the delivery of this deed, but when a deed is produced by a grantee, delivery is presumed (*Secard*

v. Davis, 6 Peters, 124; *Gaines v. Stiles,* 14 Peters, 322), as of the date of the deed (13 *Cyc.* 731 and cases cited).

As shown in the statement of the case, Smith became financially embarrassed by the panic which started in the fall of 1907 (1335-6), and on February 14th, 1908, he pledged 300 of his shares in the Company to the Swedish American National Bank as security for his obligations to that bank, aggregating about $330,000 (1301). The pledge was made by a transfer of the shares on the books of the Company in accordance with the provisions of the Statutes of Minnesota (Revised Laws 1905, §2863 (979-80). On February 15th, 1908, fifteen of his shares were sold and transferred on the books of the Company to Johnson (180, 1274-5). On February 28th, 1908, he pledged additional 10 shares to Swanson for an indebtedness to the latter of $5,000 (980-81, 1335). He had pledged to the bank bonds of another company in addition to the 300 shares (1316-17, 1336), and on October 31st, 1908, in order to procure a release of these bonds and enable him to sell and realize on them, he pledged additional 208 shares to the bank. An arrangement was made by which the bank as security for his large indebtedness should hold a majority of the stock, with trustees entitled to vote it, and with the trustees members of the board of directors, so as also to control that board (972-8, 981-2, 987-94). The pledge to the bank originated in a resolution of its board requiring all its directors, of which Smith was one, to furnish collateral

for their obligations to the bank (1319, 1362).

As pointed out in the statement of the case, when the orginal bill was filed, as well as on August 11th, 1908, when the suit was actually commenced against Smith, the status of the Company was as follows: Smith was president and a director and held 673 shares of stock; Johanna A. Smith was vice-president and a director and held one share; Vernon A. Smith was secretary and a director and held one share; Nan A. Smith was treasurer; Charles J. Johnson owned 15 shares; the Swedish American National Bank held 300 shares transferred to it on the books, as security for Smith's indebtedness; Charles J. Swanson held 10 shares, transferred to him on the books for Smith's indebtedness. On November 16th, 1908, when the suit was commenced against the Company, Smith was a director and the vice-president and held 465 shares unencumbered; B. F. Nelson was president and a director and held one share as trustee for the bank; C. C. Wyman was a director and the secretary and treasurer and held one share as trustee for the bank; the bank held 525 additional shares transferred on the books, 508 as security for Smith's indebtedness and 15 for Johnson's, with the right to have the shares voted by the two trustees; C. J. Swanson held 10 shares, transferred on the books as security for Smith's indebtedness.

In view of these facts, we can see no warrant for the statement in the opinion of the Court of Appeals, page 1454, that, "He (Smith) owned all the capital stock"; that "he owned all the lands"; or

for the statements in the opinions of both the lower courts that "Smith was the corporation and the corporation was Smith" (1415, 1454). Smith *never* owned *all* the stock, for the two shares which at the outset were issued to his fellow directors, though paid for by him, were owned and held in point of law by those directors, with the double liability to creditors incident thereto under the constitution of Minnesota, Article 10, Section 3; and, of course, he did not own all the stock after the fifteen shares had been sold and transferred to Johnson or after his shares had been pledged for his debts to such an extent as to take the control of the corporation out of his hands. Moreover, the law is well settled, both in this country and England, that when a corporation is legally organized there is no privity between it and any stockholder, no matter how large the interest of the stockholder my be.

(d) *The Law, generally, as to the separate entity of corporations.*

The law under which a corporation is created determines its rights and duties (*United States v. Council of Keokuk*, 6 Wall. 514, 516); its powers and immunities (*Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 667); and its relation to its stockholders (*Glenn v. Liggett*, 135 U. S. 533, 548).

In *Van Allen v. The Assessors*, 3 Wall. 573, the court had occasion to consider the relation between

a corporation and its stockholders as respects the corporate property and said, page 584:

"The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter and the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of *Queen v. Arnoud* (2 Adolphus & Ellis, New Series, 806). The question related to the registry of a ship owned by the corporation. Lord Denman observed: 'It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase or loss from its decrease; but in no legal sense are the individual members the owners.'"

In *Hale v. Henkel*, 201 U. S. 43, where the distinction between a corporation and its stockholders was considered, the court said, page 76:

"A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. * * * It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination."

In *Merchants Nat'l. Bank v. Wehrmann*, 202 U. S. 295, the court says, page 300:

"We may assume further, in accordance with a favorite speculation of these days, that philosophically a partnership and a corporation illustrate a single principle, and even that the certificate of a share in one represents property in very nearly

the same sense as does a share in the other. In either case the members could divide the assets after paying the debts. But from the point of view of the law there is a very important difference. The corporation is legally distinct from its members, and its debts are not their debts."

In *Donnell v. Hereing, etc., Co.*, 208 U. S. 267, the court is again considering the distinction between a corporation and its stockholders and says, page 273:

"Philosophy may have gained by the attempts in recent years to look through the fiction to the fact and to generalize corporations, partnerships and other groups into a single conception. But to generalize is to omit, and in this instance to omit one characteristic of the complete corporation, as called into being under modern statutes, that is most important in business and law. A leading purpose of such statutes and of those who act under them is to interpose a non-conductor, through which in matters of contract it is impossible to see the men behind."

To the same effect *Gibbons v. Mahon*, 136 U. S. 549, 557. Here Mr. Justice Gray says:

"The distinction between the title of a corporation, and the interest of its members or stockholders, in the property of the corporation, is familiar and well settled. The ownership of that property is in the corporation, and not in the holders of shares of its stock."

In *Fitzgerald v. Missouri, etc., Ry. Co.*, 45 Fed. 812, Judge Caldwell of the Eighth Circuit had occasion to consider the distinction between a corporation and its stockholders with respect to federal jurisdiction, and said, page 818:

"The owner of all the stock and bonds of a corporation does not own the corporate property. The corporate property, which includes all rights of action and claims for damages belongs to the corporation and is subject to the management and control of its board of directors. And if it be conceded that the defendant owns all the stock and bonds of the Denver Company, that fact gives it no title to or interest in the right of way or other property of that company, which it can make the basis of an action or plea in its own behalf."

An insolvent bank had organized two corporations to take title to certain real property, the bank taking and holding their stock and their notes and mortgages. The Circuit Court of Appeals for the Eighth Circuit considered the relation resulting between the bank and these corporations and said, speaking by Judge Sandborn:

"Nor could the bank disregard or ignore the existence of these realty corporations, and convey their title to this land. It is one thing to create a corporation and another to dissolve it. It is one thing to vest title to property in a corporation. It is another to divest it. Any one may deed land to a corporation, but no one but the corporation can reconvey it. At the time this assignment was made the title to these lots was in the realty corporations. The bank had no title to them and no equitable interest in them, except that of a creditor and a stockholder of the corporation that held them. Its deed could not convey and its mortgage could not encumber the title to this land. The corporations which held it were existing entities, as distinct and separate from their stockholders and creditors as is one individual from another. They and they alone, had the power to sell, convey, mortgage and deal with the lots they held. The charters of the corporations and the law of the land denied their stockholders and creditors this privilege."

In *Oregon, etc., Ry. Co. v. Postal, etc., Co.,* 111 Fed. 842, the court held that a corporation organized under the laws of Idaho could exercise the right of eminent domain although it was owned and controlled by a foreign corporation. Judge Gilbert cites with approval *Exchange Bank v. Macon Const. Co.,* 97 Ga. 1, 33 L. R. A. 800, to the proposition that—

"One corporation owns the entire capital stock of another does not vest in the former the legal title to the property of the latter, nor render the two corporations identical; on the contrary, they are separate and distinct legal entities."

In this Georgia case the subject is carefully considered and the authorities extensively reviewed. The court says:

"Every corporation is a person—artificial, it is true, but nevertheless a distinct legal entity. Neither a portion nor all of the natural persons who compose a corporation, or who own its stock and control its affairs, are the corporation itself; and when a single individual composes a corpporation, he is not himself the corporation. In such case the man is one person, created by the Almighty, and the corporation is another person, created by the law. It makes no difference in principle whether the sole owner of the stock of a corporation is a man or another corporation. The corporation owning such stock is as distinct from the corporation whose stock is so owned as the man is from the corporation of which he is the sole member."

The subject is exhaustively discussed in *Patton v. Hoffman,* 61 Wis. 20, 50 Am. Rep. 131. The sole owner of the stock of a corporation recovered

a judgment in replevin for property owned by the corporation and the question was whether the judgment should stand. The court reversed it, because—

"From the very nature of a private business corporation, or indeed of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real though artificial person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed and disposed of. It must purchase, hold, grant, sell and convey the corporate property, and do business, sue and be sued, pleads and be impleaded, for corporate purposes, by its corporate name. * * * A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. * * * These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not therefore own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else."

See also *Cook on Corp.* (Fifth Ed.), paragraphs 6, 709 and cases cited; *Machen Modern Law of Corporations,* paragraph 1076, and cases cited.

The most thoroughly considered case is *Salomon v. Salomon & Co.*, decided by the House of Lords, A. C. 22, Law Journal, 1897, Vol. 66, p. 35. Salomon, a trader, transferred his business to a corporation, organized under the Companies Act by him-

self and six members of his family. He took all the shares except six, which were issued one each to the other incorporators. He and two of his sons constituted the board of directors. In payment for the business he took besides the shares the company's debentures for £10,000; these he pledged, and when the company failed, leaving many unsecured creditors, he claimed the surplus realized on the debentures. The chancellor and the Court of Appeal held him liable for the company's unsecured debts and held these a lien on the surplus because of fraud in over-valuing the consideration for the stock and debentures, and because the company, it was said, was but an alias for himself. But the House of Lords held there was no fraud on the company; and upon the claim of identity between Salomon and the company we quote from the opinion of Lord Chancellor Halsbury:

"The important question in this case—I am not certain whether it is not the only question—is whether the respondent company was a company at all; whether, in truth, that artificial creation of the legislature had been validly constituted in this instance; and, in order to determine that question, it is necessary to look at what the statute itself has required in that respect. I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the statute itself. Now, that there were seven actual living persons who held shares in the company has not been doubted. As to the proportionate amounts held by each I will deal presently; but it is important to observe that this first condition of the statute is satisfied, and it follows as a consequence that it would not be competent to any one, and certainly not to these persons themselves, to deny that they were sharehold-

ers. I must pause here to point out that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. One share is a sufficient qualification for each of the seven signatories. Still less is it possible to contend that the motive of becoming shareholders or of making them shareholders is a field of enquiry which the statute itself recognizes as legitimate. If they are shareholders they are shareholders for all purposes; and, even if the statute was silent as to the recognition of trusts, I should be prepared to hold that if six of them were trustees for the seventh, whatever might be their rights *inter se*, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities; and dealing with them in this relation to the company, the only relations which I believe the law would sanction would be that they were corporators of the corporate body. I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation of a company that the law should recognize only that artificial existence, quite apart from the motives or conduct of individual corporators.

"In saying this I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to show that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of *scire facias* you could not prove the fact that the company had no real legal existence. But, short of such proof, it seems to me impossible to dispute that, once the company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what

those rights and liabilities are. I will, for the sake of argument, assume the proposition that the Court of Appeal lays down, that the formation of the company was a mere scheme to enable Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself, and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.

"I observe that Mr. Justice Vaughan Williams held that the business was that of Salomon, and of no one else, and that he chose to employ as agent a limited company. And he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent—the company. I confess it seems to me that that very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is and there is not a company. Lord Justice Lindley, on the other hand, affirms that there were seven members of the company, but, he says, it is manifest that six of them were members simply in order to enable the seventh himself to carry on business with limited liability, and that the object of the whole arrangement was to do the very thing which the Legislature intended not to be done. It is obviously necessary to enquire, where is that intention of the Legislature manifested in the statute? Even if we were at liberty to insert words to manifest that intention, I should have great difficulty in ascertaining what the exact intention thus imputed to the Legislature is or was. In this particular case it is the members of one family that represent

all the shares; but if the supposed intention is not limited to so narrow a proposition as this, that the seven members must not be members of one family, to what extent may influence or authority or intentional purchase of a majority among the shareholders be carried so as to bring it within the supposed prohibition? It is, of course, easy to say that it was contrary to the intention of the Legislature—a proposition which, by reason of its generality, it is difficult to bring to the test; but when one seeks to put as an affirmative proposition what the thing is which the Legislature has prohibited, there is, as it appears to me, an insuperable difficulty in the way of those who seek to insert by construction such a prohibition into the statute. As one mode of testing the proposition, it would be pertinent to ask whether two or three, or, indeed, all seven, may constitute the whole of the shareholders; or whether they must be all independent of each other in the sense of each having an independent beneficial interest—and this is a question that cannot be answered by the reply that it is a matter of degree. If the Legislature intended to prohibit something, it ought to specify what that something is. All it has said is that one share is sufficient to constitute a shareholder, though the shares may be 100,000 in number. I am unable to get from the statute itself a limitation of that provision that that shareholder must be an independent and beneficially interested person.

"I find all through the judgment of the court of Appeal a repetition of the same proposition to which I have already adverted—that the business was the business of Salomon—and the company is variously described as a myth and a fiction. Lord Justice Lopes says: 'The Act contemplated the incorporation of seven independent *bona fide* members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader.' The words 'seven independent *bona fide* members with a mind and will of their

own and not the puppets of an individual' are by the construction to be read into the Act. Lord Justice Lopes also said that the company was a mere *nominis umbra*. Lord Justice Kay says: 'The statutes were intended to allow seven or more persons *bona fide* associated for the purpose of trade to limit their liability under certain conditions and to become a corporation. But they were not intended to legalize a pretended association for the purpose of enabling an individual to carry on his own business with limited liability in the name of a joint-stock company.'

"The learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing, if it had a legal existence, and if, consequently, the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered."

* * * * *

"The truth is that the learned judges have never allowed in their own minds the proposition that the company has a real existence. They have been struck by what they have considered the inexpediency of permitting one man to be, in influence and authority, the whole company; and assuming that such a thing could not have been intended by the Legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. I say, with the utmost deference to the learned judges, that we have nothing to do with the question whether such a result be right or wrong, politic or impolitic, if this company has been duly constituted by law. Whatever may be the motives of those who constitute it, I must decline to insert into that Act of Parliament limitations which are not to be found there."

Lords Watson, Herschell, Macnaghten and Davey gave exhaustive concurring opinions in this

case, but the reasoning being substantially the same as the chancellor's, we omit to quote.

B.

WAS THERE ANY FRAUD IN THE ORGANIZATION OF OR THE CONVEYANCE TO THE LINN AND LANE TIMBER COMPANY?

No such fraud is found or suggested in the opinion of the district judge, but in the opinion of the Court of Appeals it is said:

"There can be no doubt that one at least of the purposes for which it was formed was to fraudulently conceal therein the title to the lands which are the subject of this suit, and to keep the titles so concealed until the time when the statute of limitations should bar the anticipated suit of the Government to set aside the patents. This is shown by the fact that the possession of the deeds which apparently were executed on June 4th, 1906, and August 17th, 1907, was retained by Smith, and that he withheld the deeds from record until three and a half months after the commencement of the suit, and the further fact, that up to the date of recording the deeds, the taxes on the lands were assessed against and were paid by the grantors and not the grantee, the corporation."

A searching examination of the record will demonstrate the error in this statement as to the purpose of Smith in organizing the Company.

The court speaks of Smith's deed of June 4th, 1906, which vested the equitable title, and Werner's deed of August 15th, 1907, which vested the legal title in the Company as *"apparently"* executed on these respective dates. As to the Werner deed there

was neither averment nor evidence that it was *not* executed on August 15th, 1907, almost a year before the original bill was filed. As to the deed from Smith, the amended bill averred that it "was not executed at the date which it bears on its face, but was executed by said C. A. Smith and Johanna A. Smith, his wife, long after the commencement of this suit and shortly prior to the time the same was offered for record" (68), and in support of this charge three witnesses were called, who saw the deed when it was filed for record on September 9th, 1908. All disclaimed expert knowledge, but testified that the deed at that time "looked very recent," "very fresh" (Cowgill, 854, 859); "presented a strikingly fresh appearance, * * * appeared to be quite fresh" (Curl, 881), "had a rather fresh look, the signature of the grantor, * * * looked as though it had been freshly written * * * I should say something like five or six months—something like that" (Froman, '90-1). How much this evidence was worth was shown on cross-examination when Cowgill gave the opinion that the signature to the amended bill, filed November 16th, 1908, was older than the signature to the original bill, filed May 25th, 1908 (869), and that the district attorney's signature to the amendment of the bill was six months old (847) when in fact it was six days old. He testified April 27th and the amendment was dated April 21st (126-7). Curl's cross-examination (883-7) and Froman's cross-examination (890-92) show their opinions to be no better. On the other hand, that the deed

from Smith (U. S. Exhibit 155, Record 925-37) as well as the other two deeds which he gave to the Company for its capital stock (Defendant's Exhibits C and D, Record 1384-91) were actually executed June 4th, and delivered June 9th, 1906, was shown by the positive testimony of Smith (1334), the positive testimony of the subscribing witnesses Ethel Steele (1250-54) and Trabert (1270-73), the positive testimony of Lind (1327-33) and the contemporaneous record of the Company (967-9). As to the statement that "one at least of the purposes for which it (the Company) was formed was to fraudulently conceal therein the title to the lands," attention is again called to the facts that legal title to the 4,480 acres involved was placed in Werner December 21st, 1904 (65), and almost immediately thereafter Smith procured a loan of $40,000 on the land on the security of a mortgage from Werner to Amsden, assigned by the latter to the First Trust and Savings Bank of Illinois (69, 110, 1337); that in January, 1905, the Government, according to the bill, "was conducting a vigorous investigation of charges of violation of the public land laws in Portland, Oregon, when a large number of said entrymen and entrywomen, together with the defendants, Frederick A. Kribs and Stephen A. D. Puter and also other persons who had acted with them in the transactions * * * disclosed to complainant that the timber and stone land entries hereinbefore set forth and described were false and fraudulent" (135); that Smith knew of this investigation (690), but he left the title

of record in Werner and took no action towards organizing the Company until May, 1906; that he then organized several companies, each to take lands assembled in a locality so as to constitute a practical separate holding (1328), and that with this in view, he vested in the defendant company the 7,440 acres which he had in Douglas County, the 3,371 acres which he had in Lane and the 36,484 acres which he had in Linn aside from the 4,480 in controversy. That it was a mere incident that the 4,480 acres were included in the deed of the Linn County lands,—included only because they were interspersed with his other lands in that county—appears conclusively from the fact that nothing was done to put the *legal* title in the Company until August 15th, 1907, the title remaining meanwhile of record in Werner. Smith, moreover, cleared the lands from the $40,000 mortgage to the First Trust and Savings Bank (1337, 1360), and when he raised money on timber bonds in April, 1908, some six weeks before the original bill was filed, he did so on the security of other timber lands, leaving the lands involved in the suit unencumbered (1336).

Is it conceivable that if Smith organized the Company for the purpose of concealing in it the title to the lands in controversy he should have waited nearly a year and a half after this investigation of January, 1905, before he took steps to organize the Company, should have left the title of record in Werner during that period and an additional fifteen months, should have cleared the land from

the $40,000 incumbrance, should have mortgaged other lands to secure his bond issue, and should have conveyed to the Company some 38,000 acres, the title to which there was no motive for concealing from the Government?

The assessment and payment of taxes after the conveyance to the Company is specified as evidence of a fraudulent purpose on Smith's part in its organization. The court must refer to the minutes of the meeting of the board in January, 1907. The Company, as already shown, became owner of nearly 53,000 acres of land soon after its organization in exchange for its capital stock. For taxes to accrue it had to sell land or borrow money. Accordingly we find in the minutes referred to a record of an arrangement to borrow the money from Smith at interest. The minutes, as shown in the statement of the case, read:

"In view of the fact that the corporation had no funds, and did not desire to dispose of any of its lands, Mr. C. A. Smith proposed to advance the money needed to pay the taxes and other necessary expenses from time to time as required, all advances made by him to draw interest at six per cent per annum. This proposition was accepted by the board" (790).

This arrangement was certainly businesslike from every point of view, especially because of the interest in the Company thereafter acquired by others. If it has a tendency to show anything material to the case, it can only be a *bona fide* relation at that time between Smith and the Company with respect to the title to the lands on which taxes were

to be paid.

There is, therefore, really nothing upon which the Court of Appeals can base the statement quoted, except the fact that the two deeds to the Company were not recorded. This the court says is a badge of fraud and quotes 20 *Cyc.* 446. The cases there collected relate to conveyances in fraud of creditors. What they hold is that if a grantor withholds the conveyance from record for the purpose of giving the grantee a fictitious credit, and the obtaining of such credit is the result, it is a fraud on the creditor. They do not hold that the mere omission to record is a fraud. For a review of the cases we refer to the opinion of Vice-Chancellor Pitney in *Flemington Bank v. Jones,* 50 N. J. Eq. 244. We think there is a clear distinction between that class of cases and the case at bar. In those cases it is the omission to record which constitutes the fraud rendering the deed voidable. In the case at bar the omission to record had no connection with the fraud relied upon for vacating the patents. That fraud, if any there was, consisted in the filings, with which Smith had nothing to do. He was just beginning to purchase timber on the Coast and these lands were his first purchase (1339). He did not want to buy in his own name because of the effect it might have on prices, and, therefore, directed the title to be taken in the name of his brother (1024-51, 1377). This is a common practice when a large tract of land is sought to be acquired gradually in one locality. It is a fraud on nobody, and the real purchaser is none the less an

innocent one (*New Banking Co. v. Montgomery*, 95 U. S. 16). Smith, as we have seen, was an innocent purchaser unless he can be charged with constructive notice. The first he knew about the grantors being entrymen under the Timber and Stone Act was when he came to Albany, Oregon, on May 21st, 1900. Then he found the purchase money for every tract had been paid and that every deed had been delivered (710, 774, 1341, 1355, 1369, 1443). For the lands involved there had been paid to the Government about $12,200 and the consideration Smith had then paid was about $25,600, the then full value (559, 1020, 1346). The omission to record deeds executed six years later could not be a fraud unless recording was a duty that Smith or his grantee owed to the Government. No such duty rested on either, legally or morally.

C.

As to the proper construction of the statute.

The Bankruptcy Act of March 2nd, 1867 (14 St. L. 518), contained limitations for the bringing of suits, which, together with the judicial construction that these enactments received, have entered into the discussion as to the legislative intent of the Act of March 3rd, 1891, and should, therefore, be noted at the outset.

Section 2 of the Bankruptcy Act contained this provision:

"But no suit, at law or in equity, shall in any case be maintainable by or against such assignee

(in bankruptcy), or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee."

Section 34 provided:

"That any creditor or creditors of said bankrupt whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same."

The passages quoted are found with slight changes of language in Sections 5057 and 5120, Revised Statutes. They soon came before the Federal Courts for interpretation. As early as 1874, this court had occasion to hold in the case of *Bailey v. Glover*, 21 Wall. 342, that in an action by an assignee in bankruptcy to obtain redress for fraud, the suit should not be deemed to have accrued, so as to set the limitation contained in section 2 running, until the fraud was discovered, and in 1883 the same was again held in *Rosenthal v. Walker*, 111 U. S. 185. Section 34 was construed in *Pickett v. McGavick*, 14 N. B. R. 236, 19 Fed. Cas. No. 11, 126, in 1876; *In re Brown*, 19 N. B. R. 312, 4 Fed. Cas. No. 1983, in 1879, and in *Matter of Herzig*, 15 Abb. Pr. (N. S.) 179, in 1885. In each of these cases it was held, referring to *Bailey v. Glover*, that the limitation in section 34 could not be construed to run from the time the fraud

was discovered the same as that in section 2, the language in section 34 being explicit that the application had to be made within two years after the date of the bankrupt's discharge. Judge Parker said in *Pickett v. McGavick*:

"Under the ordinary statutes of limitations, which provide that suits shall be brought in a specified time after the cause of action accrued, it has become a fixed rule, that, where an action is based on fraud, the statute does not commence to run until the discovery of the fraud, or until it has become known to the party injured by the fraud, because it can well be said that a cause of action does not accrue until the party could avail himself of a remedy to enforce that cause of action, and he could not do so until the cause of action was discovered or became known to him. But this section is different from the ordinary statute of limitations * * *. It positively provides that the discharge may be contested at any time within two years after the date thereof, on the ground that it was fraudulently obtained."

Judge Choate cited the case with approval *In re Brown*, and said:

"It appears to me that the language used, 'two years after the date thereof,' is not capable of that enlargement by construction that has been found possible in statutes of limitation generally."

Judge Brown, in *Matter of Herzig*, said:

"Under this section (section 2) in cases of concealed fraud, it is held that the cause of action does not accrue until the discovery of the fraud or reasonable means of knowledge of it (*Bailey v. Glover*, 21 Wall. 342; *Rosenthal v. Walker*, 111 U. S. 185, 190). Section 5120, however, is so different in its language as not to admit of any enlargement by similar latitude of construction."

When Congress in 1891 took up the subject of limiting the time for attacking the validity of patents, it did so, first, by the adoption of section 8 of the Act, found in 26 St. L., page 1095, and next by the act amending that section, found on page 1903. The main act contained sweeping changes in our public land-laws. The timber-culture and pre-emption laws were repealed; the desert-land and homestead laws were amended, and provisions were made for the disposition of lands in Alaska for town-sites, trade and manufacturing purposes. The different land-laws so repealed or enacted provided for patents. The repeals and amendments were contained in the first seven sections. Then followed section 8 in this language:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

It should be noted that in the first seven sections, provisions were made for perfecting claims under the acts repealed, and that the validity of such claims under the pre-emption law depended upon an affidavit under Revised Statutes, section 2262, of substantially the same import as the affidavit required by section 2 of the Timber and Stone Act; also that section 5 amended section 2290 of the Revised Statutes so that a person thereafter making a homestead entry had to take an oath, that his application was "not for the benefit of any

other person, persons or corporation," or "in collusion with any person, corporation or syndicate to give them the benefit of the land entered," or "for speculation." The limitations in section 8 as to patents issued and to be issued, had thus an almost direct reference to patents voidable for fraud.

When the act was passed, there were outstanding thousands upon thousands of patents under the Timber and Stone and other acts, subject to attack for fraud. As to them, the act said that suit should *"only"* be brought within five years from its passage. No *other* limitation was fixed. As to that multitude of then existing patents, suits to vacate them on account of fraud became therefore barred on March 3rd, 1906, or have never since become barred, and never will be, unless another act is passed. The same is true of the vast number issued after the passage of the act. Suits to vacate them are *"only"* to be brought within six years after their dates. The act makes no *other* limitation. If the dates are not to determine the period of limitation for suits brought to set them aside for fraud, then there *is* no limitation to suits of that nature. As to either class of patents, the time of the discovery of the fraud is immaterial, for the Act does not pretend to create a period of limitation with reference to that time; and while the time of the discovery of the fraud might affect the standing of ordinary litigants by reason of laches, it could not so affect the Government.

On the supposed authority of *Bailey v. Glover* the Court of Appeals held that the statute did not

run against the suit from the dates of the patents, but from the time of the discovery of the fraud, saying:

"No distinction between the statute of limitations involved in that case (*Bailey v. Glover*) and that involved in the present case is to be found in the fact that in the former the time is limited from the date 'when the cause of action accrued'" (1457).

Thus the court held, in effect, that the words: "within five years from the passage of this act," and "within six years after the date of the issuance of such patents," mean within five or six years "after the cause of action accrued," or "after the discovery of the fraud."

It may serve no purpose to discuss the meaning of plain language, but it may be interesting to see how it was understood by Congress when the Act of March 2, 1906 (29 St. L. 42), was passed, extending the limitation as to a certain class of patents.

On December 18th, 1895, the Commissioner of the General Land Office addressed a letter to the Secretary of the Interior, stating that the department was engaged in recovering lands erroneously patented, but would be unable to complete the work within the time fixed by the Act of 1891 and he therefore suggested that the time should be extended. The Secretary thereupon addressed a letter to the President, who sent both letters to Congress with a message in which it was said by way of recommendation that,

"In these circumstances, it seems to me that the Act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants" (*Congressional Record*, Vol. 28, Part 2, pp. 1062-3).

Two bills were thereupon introduced—one for the entire repeal of the Act of 1891, the other for its amendment. The former was rejected; the latter was adopted upon the recommendation of the House Committee on Public Lands, in whose report the purpose of the Act to be amended was described as follows:

"In order that all these questions might be speedily adjusted, and that any proposed litigation for the purpose of annulling patent titles should be promptly brought, the limitation act of 1891 was passed, requiring that all such suits as to patents already issued should be commenced within five years, or prior to March 3, 1896, and that as to patents subsequently issued suits to cancel the same should be brought within six years after the date of the patent."

Then referring to the pending bill the report said:

"While it is important that the rights of the Government should be cared for, and that a reasonable time for adjustment of these grants should be given, it is also of the highest importance that the validity of the Government's patents should be examined as speedily as practicable so that former settlers and those who wish to become settlers or purchasers of these lands may know that the Government patents issued by the highest authority of that nation shall be evidence of a final and complete character that the Government's title has been lawfully transferred.

* * * * * * *

"The limitation may perfect titles in some instances founded in more or less *of fraud or mistake.* So it happens with all such statutes, but universal experience has demonstrated the necessity of such statutes" (*Congressional Record,* Vol. 28, Part 2, p. 1761).

This report and the debate on the bill show that the general view in Congress was that all fraudulent patents became "evidence of a final and complete character that the Government's title had been lawfully transferred" if suits to vacate them were not commenced within the specified time. And it is perhaps worth noting that in the Act adopted by way of amendment the language of the old Act was repeated:

"That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the Second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to" (29 St. L. 42).

Within a year after the adoption of this amendment this court in *United States v. Winona, etc., Railroad Co.*, 165 U. S. 463, considered with care the intent, purpose and policy of Congress in passing the original act and the amendment, and expressed its views as follows, speaking by Mr. Justice Brewer:

"In the first place, it (Congress) has distinctly recognized the fact that when there are no adverse individual rights, and only the claims of the Government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should, after the lapse of a prescribed time, be conclusive against the Government, and this notwithstanding any errors, irregularities or improper action of its officers therein.

"Thus, in the act of 1891, it provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued such suits should only be brought within six years after the date of issue. Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the land department. The act of 1896 extended the time for the bringing of suits for patents theretofore issued for five years from the passage of that act. It is true that these appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent by providing that after a certain time the Government, the grantor therein, should not be heard to question them."

The Act came again before this court in *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447. Patent had been issued to two islands in the Sault Ste. Marie, which the Government brought suit to annul as cloud on its title, claiming that it was void, the land having been reserved for public purposes. The defendant invoked the Act of 1891. The court, again, considered the intent and purpose of the Act and held that, although it was in form a statute of limitation, it was in reality a confirmation by Congress of patents which had been permitted to stand unquestioned for the specified time. Says the court, speaking by Mr. Justice Holmes:

"There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of opinion that now the patent must be assumed to be good. The statute just referred to provides that 'suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act,' that is to say, from March 3, 1891. This land, whether reserved or not, was public land of the United States and in kind open to sale and conveyance through the Land Department. *United States v. Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476. The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was

no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'Any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. *Leffingwell v. Warren*, 2 Black. 599.

"In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to effect the right, even if in terms only directed against the remedy. *Leffingwell v. Warren*, 2 Black. 599, 605; *Sharon v. Tucker*, 144 U. S. 533; *Davis v. Mills*, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See *United States v. Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476."

We think the foregoing must suffice to show the error of the Court of Appeals in holding that the Act of 1891 does not commence to run from the date of the patents, but from the time when the fraud affecting their validity is discovered by the Government. But the decision has been followed by the Circuit Court of Appeals for the Eighth Circuit in the case of *United States v. Exploration Company*, 203 Fed. 387, and as that decision will doubtless be cited for the appellee, we call attention to it here.

The bill in that case charged that the Exploration Company was a British corporation not qualified to acquire or hold coal lands, and that to defraud the Government it had procured patents to "dummy" entrymen and had concealed this fraud

until six years after the date of the patents by various affirmative acts of fraud, such as falsifying the dates of the deeds from the entrymen, having conveyances made to secret trustees, and withholding from record and from the knowledge of the Government several *mesne* conveyances, which, if known, would have disclosed the true facts in the premises. The court held the bill good on demurrer, reversing the lower court. It is not clear, however, whether it was intended to hold that when fraud is involved the statute does not begin to run until it is discovered, or only that such is the case when the party who had perpetrated the fraud keeps it concealed by affirmative fraudulent acts. We contend that both propositions are unsound as applied to the Act of 1891. The conclusions in that case and in the case at bar we think must have been reached by applying decisions of unquestioned authority in the construction of other statutes of limitations, but wholly inapplicable to the Act in question. This we will endeavor to point out as briefly as possible.

Taking some of the cases referred to directly or indirectly—the cases which we anticipate will be cited by counsel for the appellee—we find that the earliest involve Statute 21 James 1, Chap. 16, found in 2 *Wood on Limitations*, 631. Section 3 of that statute provided that certain specified actions at law "shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say * * * within six years next after the cause of such actions or suit

and not after." As this language applied in terms to actions at law only, it came to be a question for the High Court of Chancery how to deal with it in equitable causes, and it was held that in cases where redress might be had either at law or in equity—cases of concurrent jurisdiction—the court would consider itself bound by its terms, otherwise not; and that in cases of exclusively equitable cognizance, the court would apply it by analogy to laches and like matters concerning the timely institution of suit. In support of this statement we cite *Bond v. Hopkins*, 1 Shoales & Lefroy, 413; *Havenden v. Annesley*, 2 Shoales & Lefroy, 607; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1; also *Sherwood v. Sutton*, 5 Mason, 143, 21 Fed. Cas. 1303, where the cases are extensively reviewed by Judge Story. Now when the Court of Chancery came to apply the statute by analogy to cases involving fraud, they properly made the statutory period of limitation count from the time when the fraud was discovered, and in that connection they gave due consideration to facts and circumstances, if any, showing concealment of the fraud from the complaining party. The often repeated statement that the statute of limitations does not bar in cases of fraud, has its source in the cases where courts of equity were thus not bound by the statute. Those cases may perhaps have influenced a liberal interpretation as to when a cause of action accrues by the terms of the statute. It seems that the courts have never come into full accord as to whether a fraud affecting the running of the stat-

ute can be taken cognizance of in a court of law, or only in a court of equity. Witness the opinion of Chief Justice Spencer in *Trout v. Smith,* 20 Johns. 32, as contrasted with that of Chief Justice Parsons in *The First Massachusetts Turnpike Corp. v. Field,* 3 Mass. 201. But this is of no importance, for when these and like cases are examined, and *obiter* remarks disregarded, we think it will be found that whenever a statute of limitation is held to be binding on the court and yet not a bar because of fraud, undiscovered or concealed, the conclusion rests upon the interpretation of language as to the initial date of the prescribed limitation. The statutes of this country have been made to follow substantially the language of the English Act in prescribing a period "after the cause of action accrues," and by way of interpretation, this language has been held to mean when the fraud is discovered, or by the exercise of reasonable diligence ought to have been discovered, considering in that connection what has been done to conceal it. Such a case is *Sherwood v. Sutton, supra.* Judge Story in that case, an action at law, considered a statute of New Hampshire, which, he says, is in substance a transcript of 21 Jac. 1, c. 16, that is to say it prescribed a limitation from the time the cause of action accrued. He dealt with a question of concealed fraud that arose on the pleadings. It is true, he spoke of fraud as an implied exception, but he rested the decision on an interpretation of the language as to when the cause of action should be deemed to have accrued.

"I do not stop to inquire," he says, "whether it is to be deemed an implied exception out of the words of the statute, or whether the right of action, in a legal sense, does not accrue until the discovery of the fraud. The authorities present some diversity of judgment in this respect. Perhaps the true mode of considering it would be, that it is a continuing fraud during the whole period of its concealment, thus knitting it to the original wrong. Nor do I perceive anything in *Buttler v. Falkner*, 3 Barn. & Ald. 288, which prohibits us from taking this view of the point."

Bailey v. Glover, cited both in the decision of the case at bar and in *United States v. Exploration Co.*, must also, when carefully read, be taken as resting on an interpretation of the language: "within two years from the time the cause of action accrued for or against the assignee." Judge Miller employs language which applies aptly to cases in which the statute is merely applied by analogy. Although he does not expressly say so, it is evidently so employed in support of his interpretation of the language quoted, for, of course, he could not have intended to hold that legislative enactments, directed to courts of equity as well as to courts at law, are not binding on the former courts. It is true that in *Kirby v. Lake Shore, etc., Railroad*, 120 U. S. 130, this court held the time did not run until the discovery of the fraud, and refused to follow a New York statute as interpreted by the courts of that state, but the decision was placed on the ground that that statute was not binding on the Federal courts of equity.

"While the courts of the Union," says Judge Harlan, "are required by the statutes creating them

to accept as rules of decision, laws of the several states, except where the constitution, laws, treaties and statutes of the United States otherwise provide, their jurisdiction in equity cannot be impaired by the local statutes of the different states in which they sit. * * * The equity jurisdiction of the courts of the United States is the same that the High Court of Chancery in England possessed, is subject to neither limitation or restraint by state legislation, and is uniform throughout the different states of the Union. * * * In view of these authorities, it is clear that the statute of New York upon the subject of limitation does not affect the power and duty of the court below—following the settled rules of equity—to adjudge that time did not run in favor of defendants charged with actual concealed fraud, until after such fraud was or should, with due diligence, have been discovered. Upon any other theory the equity jurisdiction of the courts of the United States could not be exercised according to rules and principles applicable alike in every state."

This was holding in effect that the Federal court of equity, not being bound by the statute, was at liberty to apply it by analogy, which was actually done by sustaining the demurrer to the bill because it was not brought until nearly seven years after the fraud was discovered.

McAlpine v. Hedges, 21 Fed. 689, cited by the Court of Appeals in the case at bar, is certainly not in point. It was a suit to set aside conveyances in fraud of creditors. The bill alleged concealment of the fraud. The statutes of Indiana referred to in the case, provide that—

"The following actions shall be commenced within six years after the cause of action has accrued and not afterwards. * * * Fourth. For the

relief against fraud. * * * If any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action" (*Burns Ann. Indiana Statutes*, Revision of 1908, Vol. 1, sections 294 and 302).

The case came within the provisions quoted.

The Act of 1891 is clearly one that is binding on the courts of equity of the United States, and therefore to be followed in accordance with its terms and not by analogy. As already pointed out, it speaks directly to those courts, for it speaks of suits to annul patents. And as already pointed out, it also speaks of suits which the United States may seek to annul for fraud. From its language we must, therefore, find when suits may or may not be brought. We find that it gives the initial date of the period of limitation in such clear language that there is no room for construction. We also find that should the courts, when fraud is involved, undertake to apply the Act by analogy merely, the patents would always remain subject to attack, a condition manifestly inconsistent with the legislative intent as interpreted by this court in *United States v. Winona, etc., Railroad Company* and *United States v. Chandler-Dunbar Water Power Company*. We said the Act is in effect a confirmation of land patents, and that view is fully justified by its language, for when it says that suits by the United States to annul patents shall *only* be brought within a given time after the Act was passed, or after the issuance of the patents, it ex-

cludes in unmistakable terms the bringing of suits later under any circumstance whatever. It presents the clearest instance of a statute of limitations that contains no exception to its operation. Under such statutes it is held that even contrivances to avoid suit until the period of limitation shall have passed will not stop their running, because should courts treat this as an exception it would not be interpretation but judicial legislation.

We will call attention to some of the cases so holding.

In *Amy v. Watertown,* 22 Fed. 418, the question was whether a statute of limitation could be invoked by a municipality in a suit against it upon its bonds, its officers having avoided service of process by resignation and other contrivances. The circuit judge said:

"It is not claimed that the exception to the statute relief upon by the plaintiff in this case is found in the statute itself, and the question is whether there are any exceptions not provided in the statute that can be recognized by the court. In examining a great many adjudged cases upon similar statutes, I find the prevailing ruling to be that, the language of the statute being general, it must receive a general construction. Perhaps it would be more logical to say that, the language of the statute being perfectly clear, it is wholly unnecessary to call in the aid of construction to ascertain its meaning; and that it is the duty of the court to enforce the law as it finds it, and not to undertake to ingraft upon it exceptions and conditions that the legislature has not seen fit to put into it. The law is clear and intelligible, and by its express terms applies to all cases not falling within one or other of the excepted cases. It should, therefore, be faithfully ap-

plied by the courts, so as to make the statute, which is one of repose, uniform and certain in its operation, and not made to depend upon the decision of some complicated issue of fact or of fraud, created by the pleadings, foreign to the purposes of the law. If the court can put one exception into the statute not found there, it can more; and no litigant could know with any certainty whether his case would fall within the statute or not."

When the case came before this court (*Amy v. Watertown,* 130 U. S. 320), Justice Bradley, discussing the question at page 325, said:

"But when a party knows that he has a cause of action, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim, or instituting such proceedings as the law regards sufficient to preserve it.

"There is one class of cases which is excluded from the operation of the statute by act of law itself, of which the case in which Mr. Justice Strong made the remark referred to is one. This class embraces those cases in which no action can be brought at all, either for want of parties capable of suing, or because the law prohibits the bringing of an action. In such cases the general law operates as a qualification, or tacit condition of the particular statute. Thus, if a man dies after commencing an action, and it abates by his death, and the limitation of time for bringing another action expires before the appointment of an executor or administrator,—the courts have held, that as there is no person to bring suit, the statute is suspended for a reasonable period, in order to give an opportunity to those interested to have the proper representatives appointed. *Blanshard on Limitations,* pp. 104-112; *Wood on Limitations,* 11, n. 4. So where a citizen of one country has a cause of action against a person who resides in another country at war with his own, the laws of nations forbids any intercourse between them, and suspends all suits and actions by the one against the other; and, there-

fore, the time, during which the right to sue is thus suspended, is not reckoned as any part of the time given by the statute of limitations for bringing an action. *Hanger v. Abbott,* 6 Wall, 532; *The Protector,* 9 Wall. 687; *Wood on Limitations,* 9, 10. Besides this general exception created by act of law, it is difficult to find any other ground or cause for suspending the operation of the statute not specified in the act itself."

In *Chemical Natl. Bank v. Kissane,* 32 Fed. 429, a bill was filed in the Circuit Court for the Northern District of California to restrain defendant from setting up the statute of limitations of California, because he had avoided suit by changing his name. Judge Sawyer holds that when no legal obstacle to the bringing of a suit has been interposed "the courts of equity of this state * * * are no more authorized to interpolate into the statute other exceptions than courts of law." He says:

"In this case, there was no legal obstacle in the way, at all. It is true the man, in a certain sense, disguised himself by assuming an additional name, and moved into another state; but there is no legal obstacle to instituting a suit. All complainant had to do was to find the defendant. It was well aware of the cause of action. It was its own fault, or misfortune, if it was unable to find its debtor. If defendant had come into this state, and gone into some of its most secluded corners, without adding a name to his own, it is not likely, he would have been found, within the time allowed by the statute. I apprehend, that no one in that case, would have set up the fact, that he could not be found till the action was barred, as an equitable ground for restraining him from availing himself of the statute of limitations. So, if being bald-headed, he should put on a wig, or cultivate his beard in such way, or wear false whiskers, or in some other way disguise himself, in addition to moving to another

state, or while staying in some secluded spot in the state, where his obligation was incurred, that would be no legal obstacle to bringing a suit. It would be simply throwing a difficulty in the way of finding, or recognizing, the man. So, taking on an additional name is only another element of the same kind of disguise. It interposed no legal impediment to the pursuing of the remedy, provided he should be found. It might make it more troublesome to find him. I think, therefore, it is not a case under our statute, or upon equitable principles established before the statutes, covering the points upon which the party can be restrained from setting up the statute of limitations. The taking on of another name is an act of disguise, and of secretion, but it interposes no legal impediment."

In *United States v. Maillard*, 4. Ben. 459, Federal Cases No. 15, 709, a suit to recover the value of merchandise forfeited by reason of a violation of a revenue act, the Government sought to avoid a plea of the statute of limitation applicable to such cases on the ground that the defendant had by concealment of the fraud prevented its discovery and the bringing of the suit within the specified five years—and this although the statute was in general terms, making no exception for a case of that kind. Judge Blatchford disposes of the question as follows:

"The replication to the plea of the statute of limitations, so far as it relates to all the causes of action except the three named in the demurrer to such plea, is based on the view, that a fraudulent concealment by the defendants, from the plaintiffs, of the acts set forth in such causes of action, until within five years prior to the commencement of the suit, whereby the same were unknown to the plaintiffs until within a period of less than five years next prior to the commencement of the suit, bars

the running of the statute. It is well settled, that, however strong the reason may be, a court cannot engraft upon a statute of limitations an exception which the statute itself does not make. *McIver v. Ragan*, 2 Wheat (15 U. S.) 25; *Bank of State of Alabama v. Dalton*, 9 How. (50 U. S.) 522; *The Sam Slick* (Case No. 12,282). So, also, the clear weight of authority, at least in the state of New York, is, that where the statute does not make a fraudulent concealment of the existence of the cause of action an exception to the running of the statute, the court has no right or power to make such exception, either directly, or by the indirect method of saying that the cause of action does not accrue, in case of a fraudulent concealment, until the discovery of the fraud. *Troup v. Smith's Ex'rs.*, 20 Johns. 33; *Leonard v. Pitney*, 5 Wend. 30; *Allen v. Miller*, 17 Wend. 202; *Humbert v. Trinity Church*, 24 Wend. 587. It is true, that Mr. Justice Story, in *Sherwood v. Sutton* (Case No. 12,782), dissents from the decision in 20 Johns., but I cannot but regard the making by the court of an exception, in a case of fraudulent concealment, when the statute does not make it, as violating the rule settled by the supreme court, as before stated. Especially must this be so where the statute has, as in the 4th section of the act of 1839, specified, in a proviso, declared exceptions."

The New York Court of Appeals in *Engel v. Fischer*, 102 N. Y. 400, 55 Am. Rep. 818, was asked to hold that although the defendant had been within the state during the period limited for bringing the suit the statute could not protect him because he had fraudulently concealed himself under a fictitious name. To this the court says:

"It is quite probable that the defendant perpetrated a fraud upon the plaintiff by concealing his residence from him, and that the statute is resorted to by him to defeat a just claim. Yet the statute must have its operation. Its plain language can-

not be perverted to remedy the hardships of any particular case. It is a benign statute, and the legislature has written in it all the exceptions which sound policy dictated to it. It may frequently operate to defeat just claims and be used by dishonest debtors to escape the payment of honest debts. A cause of action may be barred before it is known to the claimant. The debtor may purposely conceal it, and yet the bar of the statute must inexorably be applied. A debtor who has always resided within the state may abscond from his home and conceal himself within the state from his creditors, and yet no one will claim that such a debtor is to be regarded as without the state, or that such concealment will defeat the running of the statute. The law gives a creditor six years' continued presence of his debtor within the state after the cause of action has accrued, and that period has been deemed ample to enable the creditor to find his debtor and to put the machinery of the law in force against him. It would lead to great inconvenience and leave the bench and bar without any certain rule, if in every case where a debtor has resided and continuously been within this state for six years after a cause of action against him accrued, and the statute of limitations is interposed as a bar to an action to enforce the same, it could be a matter of inquiry and litigation, upon disputed evidence, whether the debtor, during any portion of the time, concealed himself, fraudulently or otherwise, and whether the creditor used due diligence to find him."

D.

THE GOVERNMENT HAD NOTICE OF THE ALLEGED FRAUD MORE THAN SIX YEARS BEFORE THE SUIT WAS BROUGHT.

Under subdivision B we have shown that the appellants were not parties to the fraud complained of in the entries and that since the issuance of the

patents there has been no concealment on their part. We now desire to call attention to the fact that if there *was* fraud in the entries it was in point of law discovered by the Government long before January, 1905, the time when discovery is admitted (135). We say in point of law because we assume that the Government, like others, must be under the rule that information which with diligence would lead to knowledge is equivalent to actual knowledge. Applying that rule, the Government is chargeable with knowledge of the alleged fraud in the entries before the patents were issued.

On February 26th, 1900, the attorneys for the Northern Pacific Railway Company wrote the Commissioner of the General Land Office and said they were advised that the entries in question "are fraudulent and are being engineered by S. A. D. Puter of Portland, Oregon and H. G. McKinley of Brownsville, Oregon" (1110-11). On March 10, 1900, they wrote again, going more into details, and said:

"A number of the timber applicants are saloonkeepers, and a number are men without apparent occupation, as we are advised, none of whom have personally examined the lands filed upon, and all of whom have probably executed relinquishment, assignment or mortgage to Puter or McKinley, whereby such title as they may acquire will inure to others than themselves" (1113).

This information led to the investigation of the entries by Special Agent Mathers, whose report thereon to the Commissioner of the General Land Office is not in evidence, but the letter of the Commissioner to Special Agent Stratford of April 15,

1901, shows that he was fully informed of the facts upon which the Circuit Court and the Court of Appeals found the entries to be fraudulent. Referring to three of the entrymen that Puter and McKinley had located, the Commissioner says:

"They stated to Mr. Mathers before the date set for final proof that McKinley had induced them to make the applications, promising to pay all expenses and after entry was made, either to buy the land himself or to find a purchaser for it, so that the entrymen would make $40.00 or $50.00 apiece, and perhaps more, from the transaction. Shortly after these conversations McKinley was arrested at the instance of Mr. Mathers for fraud in connection with this matter, and it seems that the fact deterred these parties and a number of others from completing the entries. The entries that were made, however, in said township, were apparently all made under the same circumstances as were contemplated in these three cases. That is, the parties were induced by McKinley or Puter to make the entries, with the understanding, in each case, that the land should be sold as soon as title had been obtained thereto. In other words, the entries were made purely for speculative purposes and not in good faith to appropriate the land to the entrymen's own exclusive use and benefit.

"Under these circumstances this office is not willing to pass these entries to patent until it has more conclusive evidence than has as yet been shown as to the impossibility of proving their fraudulent character" (824).

Special Agent Stratford, in concluding his investigation in March, 1902, reported his own conclusions to the Commissioner in this language:

"I am frank to say that I have some reason to believe that everyone of these entries were and are fraudulent, but I am just as frank to say that I do not believe I can prove it."

Upon receipt of this report the matter was turned over to the Secretary of the Interior (831), who placed it in the hands of his own special inspector, A. R. Green (915). The latter said in his report to the Secretary:

"About two years ago a man named John A. Willd, representing a lumber company in Minnesota, had these lands cruised and through his instrumentality they were entered, principally under the Timber and Stone Act. The financial agent of this man was Frederick A. Kribs of Portland, Oregon. The cruiser was Horace G. McKinley, who was also the locator and induced the entrymen to take up the lands, representing to them that the mill company stood ready to take them off their hands as soon as final proof could be made and that he wanted only such applicants as would be ready to sell when the time came. Pursuing this policy, McKinley secured a number of men and women from among the class whose living is precarious, largely from the saloons and rooming houses and around the depots and wharves of the towns along the valley and the lands were entered. In 28 of the 67 cases referred to in this connection, the lands were mortgaged to Kribs on the day of final proof; eight tracts were mortgaged to him one day after proof and one tract three days after proof. Twelve tracts were deeded straight to Kribs on the day of proof and 28 tracts were deeded to Willd within five days after proof (918-19). * * * Referring again to the cases where Kribs became mortgagee and Willd purchaser immediately after final proof, a strong presumption of collusion is raised. Take the entry of John Harrison of Brownsville, for example. His final proof certificate is number 8235 and dated May 16, 1900. On the same day he mortgaged to Kribs for $600 and the day following he deeded to Willd for $1.00. An isolated case of this kind might occur in good faith and honesty possibly, but when it comes to a great number of cases of precisely similar facts, it is quite a different matter" (920-1).

The decision of the Secretary of the Interior which followed this report recites the facts of which he was advised. He refers to the report from Green, just quoted (833-34); to the information from the attorneys of the Northern Pacific Railroad Company (834-35); to the arrest of McKinley on a charge of subornation of perjury in connection with the entries (835); to the mortgages to Kribs and the deeds to Willd (835-36); to the opinion of Stratford "that every one of the entries were and are fraudulent" (836), and to the opinion of the Commissioner of the General Land Office that

"While these things raise a suspicion as to the bad faith of the entrymen, they do not furnish such positive evidence of fraud as will justify the cancellation of the entries under the decision of the court in the case of *United States v. Budd*" (840).

The record to which attention is called shows that the officers of the Government, upon substantially the same facts as those disclosed on the trial, believed that the entries were in fact fraudulent, but considered the evidence not so "clear, unequivocal and convincing," as required by the law. But the information at hand was a discovery of the fraud, if fraud there was. The rule in that respect is stated in *Wood v. Carpenter,* 101 U. S. 135, 141, quoting from *Kennedy v. Green,* 3 Myl. & K. 722:

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it."

E.

THE LINN & LANE TIMBER COMPANY WAS AN INDISPENSABLE PARTY AND DID NOT HOLD SUBJECT TO LIS PENDENS.

Those who hold title under patents which are sought to be vacated must be made parties. *United States v. Central, etc., Ry. Co.*, 118 Fed. 449-458, and cases cited; *United States v. Winona, etc., Ry. Co.*, 67 Fed. 948, 961. They cannot be considered parties for any purpose until process is served upon them, or at least issued for the purpose of service. *Miller v. McIntyre*, 6 Pet. 62, 65; 3 *Roses Notes*, 225 and cases cicted; *Miller v. Sherry*, 2 Wall. 237, 250; *United States v. Martinez*, 195 U. S. 469.

Although it was not claimed in the courts below that the Company held subject to *lis pendens* because its title was not recorded when the original bill was filed, we shall briefly call attention to the law on that subject.

Some states have adopted recording acts which have the effect of making the title under an unrecorded deed subject to *lis pendens* and where such statutes are in force, the courts hold, and properly, that a judgment affecting the title to the land is binding upon him who holds under unrecorded conveyances, although he is not made a party. But no such statute has ever been adopted in Oregon. The first provision for recording a notice *lis pendens* was enacted in 1909 (Lord's Oregon Laws, sec. 7130). No duty is imposed on any one to record his

title. The consequences of not recording it merely to subject the land to the lien of judgments docketed against persons appearing by the records to have the title (Lord's Oregon Laws, §207), to attachments against such persons (§301) and to protect innocent purchasers (§7129). That recording a deed is not required to pass title has repeatedly been held by the Supreme Court of the state (*Moore v. Thomas,* 1 Ore. 201; *Musgrove v. Bonser,* 5 Ore. 313, 316; *Baker v. Woodward,* 12 Ore. 3; *Manaudas v. Mann,* 14 Ore. 450; *Jennings v. Kiernan,* 35 Ore. 349, 361; *Goodnough v. Warren,* 5 Sawyer, 494). In *Jennings v. Kiernan, supra,* and especially in *Walker v. Goldsmith,* 14 Ore. 125, it is expressly held that the recording act has no application to *lis pendens* and that the equity rule of *lis pendens* of which we shall presently speak, is unaffected by the statutes of the state.

The law of *lis pendens* originated in a chancery rule promulgated by Lord Chancellor Bacon, reading as follows:

> "No decree bindeth any that cometh in *bona fide,* by conveyance from the defendant before the bill exhibited, and is made no party, either by bill nor the order; but where he comes in *pendente lite,* and while the suit is in full prosecution, and without color of allowance or previty of the court, there regularly the decree bindeth."
>
> (Chancellor Kent's opinion in *Murray v. Ballon,* 1 Johns. Ch. 567).

The rule has been incorporated in the Oregon statutes, Lord's Oregon Laws, §756, in this language:

"The effect of a judgment, decree or final order in an action, suit or proceeding before a court or judge thereof of this state, or of the United States, having jurisdiction to pronounce the same, is as follows: * * *

"(2) In other cases (not those *in rem* specified in subdivision 1), the judgment, decree or order, is, in respect to the matter directly determined, conclusive between parties and their representatives and successors in interest by title subsequent to the commencement of the action, suit, or proceeding litigating the same thing, under the same title, and in the same capacity."

(See also Lord's Oregon Laws, §337).

While the statute does not, like Bacon's rule, say that "no decree bindeth any that cometh in *bona fide*, by conveyance from the defendant before the bill exhibited," this is implied when it says the decree shall be conclusive on "successors in interest by *title subsequent* to the commencement of the action, suit or proceeding litigating the same thing." The construction given in *Walker v. Goldsmith* and *Jennings v. Kiernan* is moreover conclusive upon the Federal courts as to what the law of Oregon is on this subject. And in all other states, where no recording act is adopted subjecting an unrecorded title to *lis pendens* the decisions are uniformly to the effect that the holder of such a title is not affected by a suit until he is made party. (Judge Cooley in *Smith v. Williams*, 44 Mich. 240; *Farmers Natl. Bank v. Fletcher*, 44 Ia. 252, 255; *Stuyvesant v. Hone*, 2 Sandf. Ch. 419, 427; *Clarkson v. Morgan*, 6 B. Mon. 441; *Irvin v. Smith*, 17 Ohio, 226, 240; *Hall v. Nelson*, 23 Barb. 88; *Seymour v. Fletcher*, 16 Col. 188, 201; *Johnson*

v. Robinson, 20 Minn. 170; *Windom v. Schuffel,* 39 Minn. 35, 37; 2 *Pomeroy Eq. Jur.,* §§637, 632, 633; *Wade on Notice,* §§363, 364, 365; 21 *Am.* & *Eng. Encyc. L.,* 650).

The difficulty of finding and making the owner of an unrecorded title a party may be good reason for legislation, subjecting him to *lis pendens,* but in the absence of such legislation the courts cannot bind him by their judgments without violating one of the best established rules of the law of real property. The chancery rule was adopted by way of remedy to make the decree binding on one who purchased pending the suit, and this has been considered sufficient in England where there has been no recording system. And in this country, where we have such a system, the record in many instances fails to furnish the name of indispensable parties, even where the recording acts subject those who hold unrecorded deeds to *lis pendens.* Take for illustration the land involved in this suit patented to Barr and Jaggy. Suppose the deeds from them, or the deeds of any of the land after its conveyance to Willd had not been recorded. Could it be claimed for a moment that filing a bill against these dead men would make a suit pending against, and a decree binding upon, the owner under the unrecorded deeds? The necessity of finding and making party, the real party in interest, regardless of the records, arises of necessity in many cases. The inchoate dower interest of a wife is in many states not affected by a decree where the husband only is made a party, although the dower

cannot be ascertained from the record (*Kurschelt v. Union, etc., Inst.*, 118 N. Y. 358). The difficulty of finding the party adversely interested in land is probably the reason why statutes of limitations generally allow twenty years for bringing suit instead of six years or less in other matters. Here the Government has limited itself to six years, but it must be taken to have done so with recognition of the necessity of finding the adverse party within that time, in conformity with the requirements of long established rules of law. With the equity process for discovery and other means of ascertaining facts, Congress has deemed six years for the commencement of a suit sufficient; and so it is.

From what is said we think it must be beyond reasonable controversy that as between the Government and the Linn & Lane Timber Company the right of the former to have the patents vacated must be determined with reference to the rights which the Company had in the land when it was made a party to the bill on November 16th, 1908.

We submit that the decree appealed from should be reversed with direction to dismiss the bill.

JOHN LIND,
A. UELAND,
W. M. JEROME,
Counsel for Appellants.

Sec. 2849:

Any three or more persons may form a corporation for any of the purposes specified in this subdivision by complying with all the conditions hereinafter prescribed. They shall subscribe and acknowledge a certificate specifying:

1. The name, the general nature of its business, and the principal place of transacting the same. Such name shall distinguish it from all other corporations, domestic or foreign, authorized to do business in this state, and shall end with "Company," "Corporation," or "Association," or the word "Incorporated."

2. The period of its duration, if limited.

3. The names and places of residence of the incorporators.

4. In what board its management shall be vested, the date of the annual meeting at which it shall be elected, and the names and addresses of those composing the board until the first election, a majority of whom, in the case of savings banks and building and loan associations, shall always be residents of the state.

5. The amount of capital stock, if any, how the same is to be paid in, the number of shares into which it is to be divided, and the par value of each share; and, if there is to be more than one class, a description and the terms of issue of each, and the method of voting thereon.

6. The highest amount of indebtedness or lia-

bility to which the corporation shall at any time be subject.

It may also contain any other lawful provision defining and regulating the powers or business of the corporation, its officers, directors, trustees, members and stockholders.

Sec. 2850:

The certificate of every such corporation shall be filed for record with the secretary of state, who, if he finds that it conforms to law, and, if a financial corporation, has indorsed thereon the approval of the public examiner, or, if an insurance company, that of the insurance commissioner, and in every case, that the required fee has been paid, shall record the same and certify that fact thereon. After such record such certificate shall be filed for record with the register of deeds of the county of the principal place of business as specified in the certificate.

Sec. 2851:

Every such certificate of incorporation shall be published in a qualified newspaper in the county of such principal place of business, for two successive days in a daily, or for two successive weeks, in a weekly, newspaper. Upon filing with the secretary of state proof of such publication, its corporate organization shall be complete.

Sec. 2852:

Every corporation formed under the provisions of this chapter shall have power:

1. To have succession by its corporate name for the time stated in its certificate of incorporation.

2. To sue and be sued in any court.

3. To have and use a common seal and alter the same at pleasure.

4. To acquire, by purchase or otherwise, and to hold, enjoy, improve, lease, incumber, and convey all real and personal property necessary to the purposes of its organization, subject to the limitations hereafter declared.

5. To elect or appoint, in such manner as it may determine, all necessary or proper officers, agents, boards and committees, to fix their compensation, and define their powers and duties.

6. To make and amend, consistently with law, by-laws providing for the management of its property and the regulation and government of its affairs.

7. To wind up and liquidate its business in the manner provided by law.

Sec. 2858:

The business of every such corporation, except savings banks, shall be managed by a board of at least three directors, elected by ballot by and from the stockholders or members; that of savings banks by a board of at least seven trustees, residents of the county of its location, each of whom, before being authorized to act, shall file a written acceptance of the trust. A majority of the directors or trustees shall constitute a quorum for the transaction of business.

Sec. 2859:

Every domestic corporation, except when otherwise specially provided, shall have a president, secretary, and treasurer, and may have one or more vice-presidents and other officers, as its by-laws provide. The by-laws shall prescribe the time and manner of their election and their respective duties. The president shall be a director or trustee; the secretary and treasurer may or may not be directors or trustees, as shall be provided in the by-laws.

Sec. 2868:

Except as otherwise provided in this chapter, the capital of any stock corporation shall in no case be less than ten thousand dollars. It shall be divided into shares of not less than one dollar nor more than one hundred dollars each, but the capital and number of shares may be increased at any regular or specially called meeting of the stockholders.

Sec. 2870:

Every domestic corporation may establish offices and conduct business in any other state or country; provided, that an office in charge of some person upon whom legal process affecting it may be served is always maintained in this state.

Sec. 2874:

Whenever any such corporation, whose incorporation has been completed, shall make application therefor to the secretary of state and pay the prescribed fee, said secretary shall execute, record

and issue a certificate, specifying the names of its incorporators, its nature and its purpose, the amount of its capital stock, the fact of its compliance with all prescribed statutory provisions, and that it is duly organized and exists as a corporation under the name, and of the kind specified, with the powers, rights and privileges, and subject to the limitations and restrictions pertaining thereto. Such certificate shall be *prima facie* evidence of the facts stated therein.

Sec. 2875:

The first meeting of every corporation, except as otherwise prescribed in its certificate of incorporation, shall be called upon not less than three weeks' prior personal or published notice, signed by one of the incorporators, to the others, and to each subscriber, if any, to its capital stock, specifying the time, place and purpose thereof. Unless otherwise provided in the certificate of incorporation or corporate by-laws, every annual meeting shall be called and held at its principal place of business upon three weeks' published notice thereof signed by its secretary, and no business transacted at any annual meeting not so called and held shall be effectual. The manner of calling and holding all meetings may be prescribed by its by-laws.

Sec. 337:

In an action to recover the possession of real property, the judgment therein shall be conclusive as to the estate in such property and the right to the possession thereof, so far as the same is thereby determined, upon the party against whom the same is given, and against all persons claiming from, through, or under such party, after the commencement of such action, except as in this section provided. When service of the summons is made by publication and judgment is given for want of answer at any time within two years from the entry thereof, the defendant or his successor in interest, as to the whole or any part of the property shall, upon application to the court or judge thereof, be entitled to an order vacating the judgment and granting him a new trial upon the payment of the costs of the action.

Sec. 756:

The effect of a judgment, decree, or final order in an action, suit, or proceeding before a court or judge thereof of this state or of the United States, having jurisdiction to pronounce the same, is as follows:

1. In case of a judgment, decree, or order against a specific thing, or in respect to the probate of a will or the administration of the estate of a deceased person, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment decree, or order is conclusive

upon the title to the thing, the will or administration, or the condition or relation of the person.

2. In other cases, the judgment, decree, or order is, in respect to the matter directly determined, conclusive between the parties and their representatives and successors in interest by title subsequent to the commencement of the action, suit, or proceeding, litigating for the same thing, under the same title, and in the same capacity.

Sec. 6726:

Every foreign corporation, and every foreign joint stock company or association, before transacting business within this state, shall file the declaration and pay the entrance fees hereinafter provided, and shall duly execute and acknowledge a power of attorney, and cause the same to be recorded in the office of the secretary of state, which power of attorney shall be irrevocable, except by the substitution of another qualified person for the one mentioned therein as attorney in fact, and such power of attorney shall appoint some person, who is a citizen of the United States and a citizen and resident of this state, as attorney in fact for such foreign corporation, joint stock company, or association, and such appointment shall be deemed to authorize and empower such attorney to accept service of all writs, process, and summons, requisite or necessary to give complete jurisdiction of any such corporation, joint stock company, or association to any of the courts of this state or United States court therein, and shall be deemed to constitute such attorney the authorized agent of such

corporation, joint stock company, or association, upon whom lawful and valid service may be made of all writs, process, and summons in any action, suit or proceeding, commenced by or against any such corporation, joint stock company, or association, in any court mentioned in this section, and necessary to give such court complete jurisdiction thereof. It shall be the duty of every such foreign corporation, joint stock company, or association, to maintain, at all times within this state, some qualified person as its attorney in fact, as herein provided, and in default thereof, it shall not be entitled to transact any business within this state or maintain any suit, action, or proceeding in its courts. If any attorney of any corporation, joint stock company, or association, appointed under the provisions of this act, shall remove from this state or become disqualified in any manner from accepting service of any writ, process, or summons, or if such corporation, joint stock company, or association shall, at any time, fail to maintain within this state such attorney in fact, valid service may be made on such corporation, joint stock company, or association by service on the secretary of state; provided, that in such case the secretary of state shall immediately notify such corporation, joint stock company, or association including copy of the writ, process, summons, or other papers served on him by mail, postage paid to such corporation, joint stock company, or association, at its principal office or place of business, as disclosed in the last report, statement, declaration, or authorization, an ap-

pointment of attorney in fact filed by it with said secretary of state; and provided further, that in such case no proceedings shall be had, unless such corporation appears or consents thereto, until forty days after such service on the secretary of state.

Sec. 6727:

Every foreign corporation, and every foreign joint stock company, or association, formed for the purpose of gain, and not heretofore lawfully transacting business in the state, shall, before transacting business in this state, file with the secretary of state a written declaration of its desire and purpose to engage in business within this state, and must set forth a full name under which it proposes to transact business, the name of the state or county under whose laws it was organized, the location of its home office, the date of its formation or incorporation, the amount of its capital stock, the nature of the pursuit, business or occupation in which it is authorized to engage, the location of its principal office within this state, the name of its attorney in fact, who shall be constituted and appointed in accordance with section 6726, the names and addresses of its principal officers, and of its directors or trustees, and the name and residence of its general agent within the state of Oregon; and said declaration shall be accompanied by a certified copy of the charter or articles of incorporation of such foreign corporation, joint stock company, or association, certified to by the legal keeper of the original, together with a certificate of the secretary of a state or territory of the United

States, or of a United States ambassador, minister, consul general, vice-consul, or charge de'affaires in a foreign country under whose jurisdiction such corporation, joint stock company, or association was formed, that such certifying officer has the requisite official knowledge as to whether such charter or articles of incorporation are of a genuine, valid, and subsisting character, and that such copy is duly certified by the officer having the legal custody of the original. Upon presentation of the declaration certificates aforesaid to the secretary of state, the person or persons presenting the same shall therewith pay to said secretary the sum of $50 for filing and recording the same, together with the annual license fee due for the succeeding fraction of the fiscal year; and the secretary of state shall thereupon, if he find the same satisfactory in substance and form, cause such declaration to be filed and recorded in the same manner as articles of incorporation of domestic corporations are recorded in his office, and the documentary evidence accompanying such declaration shall be filed and suitably entered in the office of the secretary of state.

Sec. 6728:

Upon a compliance with the foregoing requirements by any such foreign corporation, joint stock company, or association, the secretary of state shall issue to it a certificate setting forth, in substance, that such corporations, joint stock company, or association, has filed a declaration, hereinbefore required, the date of such filing, and a recital of the

other facts stated in such declaration, together with the fact that such corporation, joint stock company, or association has furnished to the secretary of state satisfactory evidence of the legal existence of such foreign corporation, joint stock company, or association, and of its authority under the law of its domicile to engage in the occupation, business or pursuit stated in said declaration, and which shall be specified in such certificate. Such certificate shall be *prima facie* evidence of the legal existence of such foreign corporation, joint stock company, or association, and of its right to begin the transaction of the business specified within the state of Oregon, whether the same shall be questioned in any court of justice in this state, or before any commission, board, officer, magistrate, or inferior tribunal whatsoever; provided, that where said certificate shall be produced in any court of justice, or before any commissioner, board, officer, magistrate, or inferior tribunal, the same shall not be admissible in evidence, or have the force or effect hereinbefore stated, unless it shall be accompanied by the receipt of the state treasurer of the state of Oregon showing the payment in full of the last annual license fee which shall have become due and payable against such corporation, joint stock company, or association, prior to the offering of such certificate in evidence, or a certificate of said officer that no such fee is due. Upon application to him for that purpose, the state treasurer shall issue such certificate in accordance with the facts. Foreign fire, marine, fire and marine,

life, accident, life and accident, plate glass, and steam-boiler insurance companies, or surety companies, which shall comply with all other laws of this state, exacting fees, license, or taxes, shall not be required to pay the fee of $50, hereinbefore mentioned.

Office Supreme Court, U. S.
FILED
NOV 16 1914
JAMES D. MAHER
CLERK

4

Supreme Court of the United States.

OCTOBER TERM, 1914.

THE LINN & LANE TIMBER COMPANY and CHARLES A. SMITH, *Appellants*,
vs.
THE UNITED STATES OF AMERICA, *Appellee*.

No. 159.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF CONCERNING FEDERAL STATUTES OF LIMITATION

WITH

APPENDIX CONTAINING PROCEEDINGS OF CONGRESS RESPECTING ACT OF MARCH 2, 1896.

JOSEPH PAXTON BLAIR,
CHARLES R. LEWERS,
Amici Curiae.

C. G. BURGOYNE, 72 to 76 Spring Street, New York.

Contents of Brief.

PAGE

Statement of reason for filing brief 1

The statutes in controversy 3

Argument 4

POINT I.—THE ACTS OF MARCH 3, 1891, AND MARCH 2, 1896, CREATED A DEFINITE LIMITATION OF THE FORMER UNRESTRAINED RIGHT OF THE GOVERNMENT TO SUE FOR THE CANCELLATION OF LAND PATENTS, AND WERE NOT A MERE MODIFICATION OF EXISTING EQUITABLE RULES LIMITING THE TIME WHEN SUCH SUITS MIGHT BE BROUGHT 6–17

(*a*) Prior to 1891 the right of the government to sue was unrestrained, either by statute or equitable rule, no matter how long the delay 6

(*b*) Suits by individuals were governed by different rules and were subject to the defense of laches 7

(*c*) This unrestrained right of the government to sue at any time caused uncertainty of titles and led to the enactment of the statutes of limitation of March 3, 1891, and March 2, 1896 8

(*d*) Proceedings of Congress show that these statutes were intended to fix an absolute and definite limitation 9

POINT II.—THE ACTS OF MARCH 3, 1891, and MARCH 2, 1896, DID NOT SUBJECT GOVERNMENT SUITS TO THE EQUITABLE RULES APPLICABLE TO PRIVATE SUITS 18–52

(*a*) The words of the statutes are definite and not subject to qualification 18

(*b*) There was no failure to repeal any rule concerning suits by the government 21

1. The theory of the court in Exploration Company Case (203 Fed., 387), was that Congress impliedly retained equitable rule concerning concealed fraud by failing to expressly repeal it 21

PAGE

2. As there were no equitable principles limiting bringing of government suits, this ruling really means that Congress affirmatively subjected government suits to the rules affecting private suits 22

(c) Courts of equity have no power to suspend the operation of a controlling statute of limitation, in either public or private suits 24

1. First statutes of limitation applied only to actions at law 26
2. Equity courts were not bound by these statutes and therefore applied them only by analogy 26
3. Courts of equity have no right to disregard statutes of limitation which are expressly applicable to their proceedings 28
4. Erroneous application of cases based on limitations dating from the "accrual" of the cause of action 28

(d) Equitable rules qualifying the application of statutes of limitation in private suits are an inseparable part of the general doctrine of laches 36

1. Courts of equity, in private suits, have always denied relief to plaintiffs who have been guilty of laches 36
2. Fraudulent concealment by a defendant creates no equitable rights by itself, and is important only as it affects the plaintiff's diligence 37

(e) The equitable doctrine of laches is not historically or practically applicable to suits by the government 42

1. It was developed in the enforcement of purely private rights 42
2. Congress did not intend to subject the government to a possible inquiry as to its negligence 43
3. Equitable rule concerning effect of concealment in private suits, where such concealment is important only as it affects the inquiry concerning the plaintiff's negligence, is not applicable to

PAGE

government suits in its original form, and there is nothing to show that Congress sought to apply it in a modified form 43

4. Comparison of two recent decisions which have attempted to apply the rule established by the lower court in the present case 44

Conclusion 52

Appendix "A."

Containing proceedings of Congress respecting Act of March 2, 1896 ..... I–CVII

Cases Cited in Brief.

Bailey v. Glover, 21 Wallace, 342 ..... 30, 31, 32, 33, 34, 35, 39

Beaubien v. Beaubien, 23 Howard, 190 39

Binns v. United States, 194 U. S., 486 9

Bond v. Hopkins, 1 Sch. & Lef., 413 27

Brown, *In re*, 4 Fed. Cas. No. 1,983 ..... 32, 33

Burke v. Southern Pacific R. R. Co., 234 U. S., 669 2

Carr v. Hilton, 1 Curtis, 230; 5 Fed. Cas. No. 2,436 29

Felix v. Patrick, 145 U. S., 317 40

Foster v. Mansfield, etc., R. R. Co., 146 U. S., 88. 39

Hardt v. Heidweyer, 152 U. S., 547 40

In re Brown, 4 Fed. Cas. No. 1,983 ..... 32, 33

Kane v. Bloodgood, 7 John. Ch., 88 27

Kennedy v. Greene, 3 Myl. & K., 722 38

Kirby v. Lake Shore, etc., Ry. Co., 120 U. S., 130 ..... 30, 39

Linn & Lane Timber Co. v. United States, 196 Fed., 593 19

Linn & Lane Timber Co. v. United States, 203 Fed., 394 19

Norris v. Haggin, 136 U. S., 386 40

Pearsall v. Smith, 149 U. S., 231 39

PAGE

Piatt v. Vattier, 9 Peters, 405 26
Pickett v. McGavick, 19 Fed. Cas. No. 11,126 ... 32, 33
Sherwood v. Sutton, 5 Mason, 143; 21 Fed. Cas. No. 12,782 29
Smith v. Clay, 3 Bro. C. C., 638 7
Standard Oil Co. v. United States, 221 U. S., 1 ... 9
Stearns v. Page, 7 Howard, 819 ..... 24, 27, 38
United States v. American Lumber Co., 85 Fed., 827 19
United States v. Beebe, 127 U. S., 338 ..... 6, 7
United States v. Chandler-Dunbar Co., 209 U. S., 447 12
United States v. Exploration Co., 203 Fed., 387 ..... 21, 22, 23, 25, 29, 33, 34, 47, 50
United States v. Lee Wilson & Co., 214 Fed., 630 45
United States v. Nashville, etc., Ry., 118 U. S., 120 6
United States v. Puget Sound Traction, etc., Co., 215 Fed., 436 48
United States v. Winona, etc., R. R. Co., 155 U. S., 463 20
Wetzel v. Minnesota Ry. Co., 169 U. S., 237 40
Wood v. Carpenter, 101 U. S., 135 ..... 7, 38

Other References.

Act of Congress, March 3, 1887 8
Act of Congress, March 3, 1891 ..... 5, 6, 18
Act of Congress, March 2, 1896 ..... 5, 6, 18
Congressional Record, Vol. 28, p. 1761 10
" " " " p. 1762 14
" " " " p. 1765 14
" " " " p. 1904 15
Revised Statutes, Sec. 5057 31
" " Sec. 5120 31
Street, Federal Equity Practice, Sec. 212 28
Wood on Limitations, Vol. 2 (2nd Ed.), 963 26

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 159.

THE LINN & LANE TIMBER COMPANY and CHARLES A. SMITH,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF CONCERNING FEDERAL STATUTES OF LIMITATION.

STATEMENT.

We are interested in the question of the effect of the Act of Congress of March 3, 1891 (*26 Stat. L., 1093*), involved in this appeal, and of

the similar Act of March 2, 1896 (*29 Stat. L., 42*), as attorneys for the Southern Pacific Railroad Company.

Two suits are now pending against this company in which the government is seeking to cancel patents to 96,609 acres of land, which was patented to this company in 1894 under the Congressional grant of July 27, 1866. As originally brought, these suits prayed for a decree quieting the government title and relied on the mineral exception in the patents for this relief. After the decision of this Court, in *Burke v. Southern Pacific Railroad Co., 234 U. S., 669*, declaring this mineral exception void, the government filed amended bills and now asks to cancel these patents on the asserted ground that they were obtained by fraudulently concealing the fact that these lands were extremely valuable in minerals. It is pleaded in attempted avoidance of the statutes of limitation that the officers of the government have only recently learned of this fraud. These suits are now pending on motions to dismiss.

This brief is confined to the discussion of the two federal statutes of limitation of 1891 and 1896.

The Statutes in Controversy.

The original statute limiting the time within which the government might bring suit to vacate and annul land patents is contained in the eighth section of an act of Congress entitled, "An act to repeal timber culture laws, and for other purposes," approved March 3, 1891, and reads as follows:

> "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents" (*26 Stat. L., 1093*).

This statute was confirmed, and the time limit fixed by it was extended as to certain patents, by the first section of the Act of March 2, 1896, which section reads as follows:

> "That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents

hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-First Congress and amendments thereto is extended accordingly as to the patents herein referred to. *Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry" (*29 Stat. L., 42*).

ARGUMENT.

Any discussion of the meaning of the Act of March 3, 1891, will necessarily involve the amendatory Act of March 2, 1896, since the two are similar in their wording and identical in conception and purpose. It will be our endeavor to show that the two were enacted with the single purpose of making titles derived from the government secure from attack at the end of a definite period, and that it was not intended that the limitations created by these acts should be sub-

ject to qualification of any sort. This discussion will be taken up under the following heads:

I. THE ACTS OF MARCH 3, 1891 AND MARCH 2, 1896, CREATED A DEFINITE LIMITATION OF THE FORMER UNRESTRAINED RIGHT OF THE GOVERNMENT TO SUE FOR THE CANCELLATION OF LAND PATENTS, AND WERE NOT A MERE MODIFICATION OF EXISTING EQUITABLE RULES LIMITING THE TIME WHEN SUCH SUITS MIGHT BE BROUGHT.

II. THE ACTS OF MARCH 3, 1891 AND MARCH 2, 1896, DID NOT SUBJECT GOVERNMENT SUITS TO THE EQUITABLE RULES APPLICABLE TO PRIVATE SUITS.

(*a*) *The words of the statutes of 1891 and 1896 are unqualified.*

(*b*) *There was no failure to repeal any rule concerning suits by the government.*

(*c*) *It is not one of the rules governing either public or private suits that courts of equity may suspend the operation of a binding statute of limitation.*

(*d*) *Equitable rules qualifying the application of statutes of limitation in private suits are an inseparable part of the general doctrine of laches.*

(*e*) *The equitable doctrine of laches is not historically or practically applicable to suits by the government.*

I.

The Acts of March 3, 1891, and March 2, 1896, created a definite limitation of the former unrestrained right of the Government to sue for the cancellation of land patents, and were not a mere modification of existing equitable rules limiting the time when such suits might be brought.

(*a*) Prior to 1891 there was no statute preventing the government from bringing suit to cancel a patent at any time it saw fit. Not only was there no statutory restraint, but even the gross neglect or long continued acquiescence of its agents was no bar, for the defense of laches could not be pleaded against the government (*United States v. Beebe, 127 U. S., 338, 344; United States v. Nashville, etc., Ry., 118 U. S., 120*). The fraud or concealment of which a holder of such a patent may have been guilty had no bearing as to the time when such a suit could be brought. As the right of the government to sue in its own interest was not affected by any statute or by laches, there was no occasion for it to plead excuses for delay, no matter how long continued. There was, therefore, no existing body of rules in 1891, legal or equitable, qualifying

the right of the government to proceed, other than such rules as affected the existence of the cause of action itself.

(*b*) On the other hand, in suits by individuals, from the earliest times equity courts have denied relief to those who have been negligent in bringing their suits. *Smith v. Clay, 3 Bro. C. C., 646.* This has been done even without the assistance of statutes of limitation.

This difference between sovereign and private litigants is not accidental. As pointed out in the case of *United States v. Beebe* (*supra*), where this distinction is noted and applied, the government sues in its public capacity for the common good and therefore should not suffer from the neglect of any of its numerous agents. But individuals ordinarily sue for the protection of purely private rights and it is considered wise policy to require that they be diligent in the assertion of these rights. *Wood v. Carpenter, 101 U. S., 135, 139.* Therefore, while the right of the government to sue for the cancellation of fraudulent conveyances was unrestrained, similar suits by private persons were limited by a comprehensive code of equitable rules making

up what is commonly known as the doctrine of laches, or by definite statutes.

The importance of this elementary distinction between sovereign and private suits, in the present discussion, lies in the fact that the government is now seeking to apply part of this equitable code to qualify the apparent literal and definite meaning of the statutes in question.

(*c*) This unrestrained right of the government to sue at any time, regardless of delay, while useful for the protection of public rights, also served to disturb the security of titles to large areas of patented lands in the western states. Prior to 1891 this situation became acute as the government had become very active in the adjustment of various land grants. This was particularly true as to railroad grants because the Act of March 3, 1887 (*24 Stat. L., 556*), had directed the speedy adjustment of such grants. Numerous suits were brought to cancel patents claimed to have been illegally issued, either through mistake or fraud. Holders of similar lands, upon which large improvements had been made in some cases, were apprehensive lest their own titles should be questioned at some future time when evidence in their behalf might no longer be available. As a

result of this fear an agitation seems to have started to obtain legislation limiting the right of the government to sue.

(*d*) This was the situation when the Act of March 3, 1891, was passed. Unfortunately we have little contemporary record of the deliberations of Congress concerning this law from which to determine the situation sought to be met by it. But the Act of March 2, 1896, is so interwoven in its conception and history with the earlier act that the two may well be considered as one. This later act was carefully considered by the officers of the Department of the Interior, by President Cleveland, and by the Committees on Public Lands of both branches of Congress. In addition it was extensively debated by members of both houses. We have printed in "Appendix A," at the end of this brief, a transcript of the entire executive and legislative history of this 1896 statute for the purpose of showing the situation with which Congress proposed to deal by the enactment of both of these laws. The right to so use these debates, and particularly the committee reports found in them, is well established by the decisions of this Court (*Standard Oil Company v. United States, 221 U. S., 1, 50; Binns v. United States, 194 U. S., 486*).

In its report recommending the passage of the 1896 statute, which originated in that committee, the Committee on Public Lands of the House of Representatives, after speaking of the disturbance caused by proceedings under the act of 1887, made the following statement of the purpose of the bill (Appendix " A," p. IV.).

> " In order that all these questions might be speedily adjusted, and that any proposed litigation for the purpose of annulling patent titles should be promptly brought, the limitation act of 1891 was passed, requiring that all such suits as to patents already issued should be commenced within five years or prior to March 3, 1896, and that as to patents subsequently issued suits to cancel the same should be brought within six years after the date of the patent. * * *
>
> " While it is important that the rights of the government should be cared for, and that a reasonable time for the adjustment of these patented grants should be given, it is also of the highest importance that the validity of the government patents should be examined as speedily as practicable, so that former settlers and those who wish to become settlers or purchasers of these lands may know that the government patents issued by the highest authority of the nation shall be

evidence of a final and complete character that the government's title has been lawfully transferred. * * *

"We cannot agree with the President that public policy requires that there should be no limitation against the government in these cases.

"We have had unpleasant object lessons in many of the Spanish grants, whose limits are as elastic and uncertain as the Venezuelan boundary. The presence of these disputed titles has cast a blight over some of our most beautiful lands for more than a generation. There should be some time fixed when such a condition shall cease to exist.

"The limitation may perfect titles in some instances founded in more or less of fraud or mistake. So it happens with all such statutes, but universal experience has demonstrated the necessity of such statutes" (*Cong. Rec., Vol. 28, p. 1761*).

We have quoted this portion of the report, which is quite long, because it fairly shows the situation as Congress then understood it. Every line of this report emphasizes the importance of making titles secure from attack or question. The reference to the "blight" upon titles caused by the uncertainties

of the Spanish grants is significant. The evil they sought to remedy was uncertainty of titles, and the predominant idea was that government titles should be made immune from further question at the end of a fixed period. This fundamental purpose of the framers of these acts was recognized and given effect by this Court by its holding in the case of *United States v. Chandler-Dunbar Co., 209 U. S., 447*, that the statute of 1891 perfected the right although in terms directed only against the remedy.

The extended debates that followed this report reinforce the conclusion we have just stated as to the single evil Congress sought to remedy. These debates are more than usually valuable because they show that but two things were in the contemplation of those who participated. On the one hand, the minority argued that the government should be left without limitation of its right to sue. The majority, on the other hand, were united in the view that a time should be fixed beyond which a title should be unquestioned. They fully recognized the incidental dangers that might follow from such a limitation but felt that securing the general tranquility of such titles was more important than the occasional losses the government might suffer.

With this thought actuating the passage of the act of 1896, and undoubtedly the earlier act as well, it is evident that the language in these acts was intended to mean just what it so plainly says. The purpose was to create a new thing, that is, a definite limitation of government suits concerning which there had been no limitation of any sort. There was no suggestion of a qualification of the literal effect of these words. While it is true that isolated declarations in debate concerning the meaning of a proposed law are entitled to little if any consideration, the fact that in this instance it was conceded and assumed by friends and foes alike that the statute, if passed, would be a fixed and definite bar, is entitled to the fullest consideration.

These debates contain no hint that Congress had in mind the silent incorporation in the statute of a proviso that cancellation suits should be brought at any time in the future as discoveries of fraud should come to the attention of the government. On the contrary, it is evident that such could not have been intended. Attention was directly called to the question of fraud and concealment, as appears from the portion of the committee report we have quoted.

It also appears in other ways. Congressmen McRae and Underwood were members of the Committee on Public Lands and submitted a minority report in which they said (Appendix "A," p. xi):

> "The undersigned members of the Committee on the Public Lands think that the government should not be prevented from initiating proceedings to correct the frauds or errors of its agents or grantees, by which much of the public domain may be passed to corporations and syndicates" (*Cong. Rec., Vol. 28, p. 1762*).

They then proposed a bill repealing the act of 1891 in accordance with the recommendation of the President. Their objection would have been pointless if it had been their understanding that the majority bill would not absolutely cut off fraud suits at the end of five or six years.

We are not left to inference alone as to their understanding. During the debate Mr. McRae called attention to the very situation that the government now contends will toll the statute. While arguing against the majority report and in favor of the repeal of the act of 1891, he said (Appendix "A," p. xi):

"My proposition is to give the President what he asks for, to give to the Department what it ought to have and what it has always had until the act of 1891, and then hold them responsible for errors and frauds. If you will do this you will hold over the heads of all corrupt agents who might be induced to perpetrate a fraud the fear of exposure and punishment, but if you fix a limitation you offer a premium to corruption. Many of the sharp, shrewd representatives of railroads will be able to cover up for a limited period fraud of the greatest magnitude and thus dishonestly take from the settlers millions of acres of land which they ought to have and could get but for the validation of such frauds by laws like the one proposed" (*Con. Rec., Vol. 28, p. 1765*).

Mr. Underwood urged, as a serious objection to the proposed law, that the government could act only through its agents in requiring information concerning patented lands. He said: "Matters of grave importance with reference to these public lands may escape the attention of agents who have recently come into office" (*Con. Rec., Vol. 28, p. 1904*). It could not have been his belief that the failure of these agents of the government to discover these "matters of grave im-

portance" before the expiration of the time fixed in the proposed law would preserve the right of the government to sue. Both he and Mr. McRae objected to the proposed law because they understood that it would have the very opposite effect. There is no suggestion that anyone disagreed with them in this interpretation. Those speaking for the law appreciated the force of these objections, but justified their course by pleading the overwhelming necessity of making patents secure from attack.

A further circumstance fortifies this conclusion. The Act of March 2, 1896, as finally passed, contains a proviso that no suits whatever shall be maintained at any time to cancel patents to lieu lands selected in place of lands lost by the failure of the government to withdraw them from sale or entry. There is nothing to indicate that the immediate bar created by this proviso was thought to be different in its conception or purpose from the five and six year bar found in the first part of the statute. Both were made absolute because in no other way could Congress bring about the definite security of titles it thought so important. This proviso is not found in the act of 1891. It is nevertheless significant, because it indicates the definite

purpose of Congress and there can be no doubt that the same purpose actuated the passage of the earlier act. If other portions of the act of 1896 are subject to qualification through the application of "equitable principles," the limitation fixed by this proviso must likewise be qualified, although it was adopted at the earnest insistence of Congressman Hepburn for the express purpose of absolutely foreclosing further question concerning titles of this particular kind.

When we consider the legislative history of these acts and particularly the purpose they were designed to accomplish, there seems no room to doubt that they should be interpreted as establishing a definite and invariable limitation of government suits. Their words do not accord with any other interpretation. This is not denied, but it is now claimed that by a process of "construction" we must incorporate within these words a qualifying "equitable principle," borrowed from private suits, to the effect that fraudulent concealment or other lack of discovery of the cause of action will toll the statutory bar. The purpose of what follows is to show that this process of "construction" cannot be legally justified and that it is really judicial legislation.

II.

The Statutes of March 3, 1891, and March 2, 1896, did not subject government suits to the equitable rules applicable to private suits.

If the present contention of the government is correct, it must be because Congress did one of three things when it passed these statutes. It either *created* the qualification, now contended for, by the words it used in these statutes; or it failed to *repeal* an existing qualification applicable to government suits; or it *adopted* the rules pertaining to private suits by the mere establishment of a limitation where none had existed. These suggestions appear to embrace every ground of support that has been urged in favor of the present government contention. We will now discuss them in some detail for the purpose of showing that no one of them can be maintained.

(*a*) *The words of the statutes of 1891 and 1896 are unqualified.*

Each of these statutes provides in definite terms that suits to vacate patents "heretofore issued * * * shall only be brought within

five years from the passage of this act", and that suits to vacate patents "hereafter issued" shall only be brought "within six years after the date of issuance of such patents."

In each case the starting of the statutory period is made as definite as possible. The Circuit Court of Appeals for the Ninth Circuit, in speaking of the statute of 1891 in the case of *United States v. American Lumber Co., 85 Fed., 827*, said: "No doubt is suggested by the language of the statute, and there is no room for construction." It is true that this same court has recently acceded to the present view of the government (*196 Fed., 593; 203 Fed., 394*), but this does not appear to have occurred by reason of any interpretation of the words of the statute, but rather on the ground that rules pertaining to private suits would operate in favor of the government. No very distinct explanation is given for this conclusion.

The language of each of these statutes is so clear and the limitations created are so definite and unqualified that resort must be had to something other than the statutes themselves to support the present contention of the government. For this reason the burden of proof must rest heavily on those who seek to qualify the literal

meaning and effect of the words of these acts. In the case of *United States v. Winona etc. R. R. Co., 165 U. S., 463, 476*, Mr. Justice BREWER, speaking for this Court, said of these statutes that they fixed a time limit upon government suits and that "it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the land department."

It is true that in that case the issue of fraud and concealment was not raised. But the interpretation and application of the portion of the Act of 1896 concerning *bona fide* purchasers was before the Court and Mr. Justice BREWER explained his reference to the limitations created by these statutes by saying that he only referred to them "as showing the purpose of Congress to uphold titles arising under certification or patent by providing that after a certain time the Government, the grantor therein, should not be heard to question them." There can be little question that it was then his view and that of this Court that the limitations

created by these statutes were absolute and incapable of qualification.

(*b*) *There was no failure to repeal any rule concerning suits by the government.*

This is true because there was nothing to repeal or refrain from repealing. We have already seen that prior to 1891 there was no limitation on the right of the government to sue at any time and that it was immaterial to its right to sue whether its cause of action had been concealed or not. Obviously, there could be no rule concerning concealment or discovery of fraud in government suits, as distinguished from private suits, that could survive the passage of the 1891 statute. This statute neither continued or repealed any such rule because none existed.

1. This proposition is so obvious that its statement would seem unnecessary. Yet we find the Eighth Circuit Court of Appeals, in the case of *United States v. Exploraion Company, 203 Fed., 387, 389*, apparently placing its decision on the ground of such a failure to repeal, saying :

> " The real question before us is whether the enactment of the statute repealed the equitable rule enforced by courts of equity,

> that, when the object of the suit is to obtain relief against a fraud, the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it."

In another place in the same opinion it is said that there is nothing in the language of the statute to indicate that Congress "intended to and did abrogate in its entirety an old and undisputed principle of equity jurisprudence." The trouble with this argument is that it disregards the plain meaning and intent of the statute and also assumes that there was such a "principle of equity jurisprudence," applicable to suits by a sovereign, which Congress could abrogate or continue in force. In addition to this, it will hereafter be pointed out that the qualifying rule applied by the court in favor of the government in the *Exploration Company case* is only a part of the "principle of equity jurisprudence" referred to, and that in its entirety it is not applicable to suits by the government.

2. What the court really did in the *Exploration Company case*, apparently without real appreciation of its own course of reasoning, was to apply to a government suit a principle of equity that had only applied to private suits in special cir-

cumstances and in the absence of controlling statutory limitations. Their decision really amounts to an assertion that the statute of 1891 affirmatively subjected government suits to the same equitable rules that controlled private suits. The "equitable principle" thus sought to be applied in the *Exploration Company case* is but one of the many constituent principles of the doctrine of equitable laches, applicable only to private suits not otherwise limited by definite statutes, as will be shown more fully later on in this brief.

This suggests the pertinent inquiry as to which of these equitable principles governing private suits shall be considered as impliedly adopted for the control of public suits as a result of the mere creation of the statutory limitation. The only logical contention must be that all or none of the incidents of private limitations were adopted. The statutes in question make no segregation. The courts have no power to pick and choose but must apply the law as they find it.

The purpose of this brief is to show, not only that Congress intended to fix an absolute limitation of government suits and employed language appropriate for that purpose, but that it could not have intended to impliedly include within

the acts of 1891 and 1896 the equitable rules qualifying the limitations of private suits. It will be our endeavor to show that the history and character of these "equitable principles" are such that they cannot have been intended to apply to suits by the goverment.

(*c*) *It is not one of the rules governing either public or private suits that courts of equity may suspend the operation of a binding statute of limitation.*

The mere statement of this proposition should be enough. It is a legitimate exercise of legislative power to require that suits shall be brought within definite periods. In those instances where the legislature has plainly limited such a period, both equity and law courts must obey. *Stearns v. Page*, 7 *Howard*, *819*, *828*. Legitimate inquiry must therefore be confined to the ascertainment of whether the statute in question has fixed a definite limitation.

Notwithstanding this, we do find in the cases an occasional apparent assertion of the right to suspend or qualify a definite statute in order to do justice in a hard situation. But in instances of this sort, the reason given for the decision will never be found to be a direct declaration of

the power to suspend or disobey an admittedly unqualified statute of limitation. The temptation to assert such a power must be strong under circumstances such as are pleaded in the present case and in the *Exploration Company case*. The courts deciding these two cases do not boldly assert that equity has power to suspend the operation of the act of 1891, but they reach the same result by finding that the statute, merely because it created a limitation, became one of the family of private limitations and therefore was subject to the qualifying power of a court of equity.

It is quite likely that the emphasis upon the unconscionable effect of the literal application of the statute in these two cases, carried these courts much further than they would otherwise have willingly gone. In their desire to accomplish substantial justice they lost sight of the fundamental purpose that actuated Congress in passing the statute. In addition, they made the double error of supposing that private statutes of limitation are always subject to equitable qualification, and that the rules concerning private suits could be applied to the distinct and peculiar situation presented in a suit by the government itself. A brief examination of some phases of the history

of the relation between equity courts and statutes of limitation will serve to support this assertion.

1. Although there is some evidence of a special statute of limitation in England as early as the twelfth century, the first general statute was passed in 1623. It applied only to actions at law. *2 Wood on Limitations, 2nd Ed., 963.* It provided that an action should be commenced within "six years next after the cause of such action or suit and not after." This statute was in force at the time of the Revolution and became a part of the common law of the states of this country.

This statute had no direct application to suits in equity. From the earliest times, and without the assistance of any statute, courts of equity had enforced a practical limitation on the bringing of stale suits by the application of the equitable doctrine of laches. *Piatt v. Vattier, 9 Peters, 405, 416.*

2. The statute of 1623 had its effect on the equity courts but it was not a controlling effect. The statute was but an incident in the evolution of the doctrine of laches. The contention was occasionally made that courts of equity were bound by this statute, but it was as often denied. Equity applied the statute only by analogy.

Stearns v. Page, 7 Howard, 819, 828. If a plaintiff asking for relief in equity had slumbered on his rights beyond the time fixed by the statute, relief was denied unless he excused his delay. On the other hand, the same courts often refused relief on the ground of the plaintiff's laches even though the delay had been less than six years.

In short, the equity courts used the period fixed by this statute as a convenient standard where there were no circumstances indicating that a different period was fair. Chancellor KENT says that, "though the courts of equity were not within the words of the statutes, the time prescribed by them was adopted by analogy as a fit and just period for a bar in equity of analogous claims" (*Kane v. Bloodgood, 7 John. Ch., 89, 113*). Lord REDESDALE, in the case of *Bond v. Hopkins, 1 Sch. & Lef., 413*, decided in 1802, emphatically declared that courts of equity were not *bound* by the statute and that, although they would respect and follow it by analogy, they would not do so where it would "prevent a court of equity doing justice according to good conscience."

This assertion of the right to ignore the term fixed by statute was not a suspension or qualification of any law. Courts of equity, not

being in terms bound by this statute, continued to apply the old doctrine of laches or the fundamental maxim that relief should be denied him who slumbered on his rights. They continued to aid vigilant plaintiffs even after the period fixed by the statute had elapsed. They had a right to do this as they were not restrained by any law passed to govern their proceedings (*Street, Federal Equity Practice, Sec. 212*).

3. The occasional failure to recognize this historical fact that equity courts were not governed by the law statutes of limitation, has caused much, if not all, of the confusion we find in some of the later decisions in this country. On account of the numerous instances where the equity courts have refused to apply the statute by analogy, because of fraud or concealment, we sometimes find judges falling into the error of supposing that courts of equity may refuse to follow the limitations of statutes passed for the purpose of directly governing their proceedings.

4. The statutes we are now considering are thus directly binding on the equity courts instead of being applicable merely by analogy. The courts therefore have no authority to disobey the limitations created by these statutes. It is true that

th ecourts that decided the present case and the *Exploration Company case* disclaim any intention to deviate from the law. But they have done that very thing under the authority of a line of cases decided under statutes barring recovery a certain number of years after the "cause of action accrued." Whether these cases are right or not, they are explainable on the interpretation made of the word "accrued" and do not justify the use made of them in the present controversy.

Mr. Justice STORY, in 1828, in the case of *Sherwood v. Sutton, 5 Mason, 143, 21 Fed. Cas. No. 12,782*, suggested that perhaps the right of action, "in a legal sense, does not accrue until the discovery of the fraud." This was said in the decision of a case at law under a New Hampshire statute said by the court to have been similar to the English act of 1623.

Mr. Justice STORY offered this suggestion concerning the time the action "accrued" with some doubt. But Mr. Justice CURTIS, twenty-four years later, in the case of *Carr v. Hilton, 1 Curtis, 230, 5 Fed. Cas., No. 2436*, stated unqualifiedly that this was the proper ground of decision. This was in a bankruptcy case where the statute provided that the suit should be barred within two years after the "cause of action shall

first have accrued." Mr. Justice CURTIS ruled that, "When the cause of action is a fraud, the action does not accrue while its cause is concealed." He added, "And this interpretation I must consider to have been within the intention of the legislature when it used the same language which had acquired a settled meaning to that effect."

This same bankruptcy statute was involved in the case of *Bailey v. Glover*, *21 Wallace*, *342*, the controlling authority cited by the court below. Mr. Justice MILLER said in that case that the great weight of authority was in favor of suspending the bar of the statute in cases where the cause of action was concealed. His language is apparently broad enough to sustain the claim that courts of equity may suspend a statutory limitation in any case where justice seems to so require, but this language must be interpreted in the light of the statute he had before him. The cases he cited in support of this statement really rest their conclusions on the assumption that there was no accrual of the cause of action until it was known to exist.

This Court, in the later case of *Kirby v. Lake Shore etc. Ry. Co.*, *120 U. S.*, *130*, after citing *Bailey v. Glover* and other earlier cases, said:

"It is an inflexible rule in those courts [*i. e.*, courts of the United States], when applying the general limitation prescribed in cases like this, to regard the cause of action as having accrued at the time the fraud was or should have been discovered, and thus withhold from the defendant the benefit, in the computation of time, of the period during which he concealed the fraud" (*p. 138*).

It is to be noted that the reference thus made is to the "general limitation." This Court was discussing the general situation and must have had in mind the usual form of statute barring relief a certain length of time after the action "arose" or "accrued." Therefore the real ground of decision in the case of *Bailey v. Glover*, as understood by this Court, must have been that the cause of action did not accrue until it became known.

Bailey v. Glover was decided in 1874 and involved the interpretation of the second section of the bankruptcy act (*Sec. 5057, U. S. Revised Statutes*), which provided that suit to set aside an assignment should be brought within two years from the time "the cause of action accrued," and not from the time the assignment was made. Section 34 of the same act (*Sec. 5120, U. S. Revised*

Statutes) provided that an application to set aside a fraudulent discharge might be made "at any time within two years after the date thereof"—that is, a time as definite as the date of patent fixed in the Act of March 3, 1891.

Two years after the decision in *Bailey v. Glover* this latter limitation came on for consideration in the case of *Pickett v. McGavick*, *19 Fed. Cas.* 588, *Case No. 11,126.* The court in this latter case refused to set aside a discharge in what it termed "a most flagrant and outrageous case of fraud," because the two years had elapsed. After quoting from *Bailey v. Glover*, as authority to date the ordinary limitation from the accrual—that is, the discovery of the cause of action, the court said at p. 588:

> "But this section is different from the ordinary statute of limitations. The language is entirely different. It positively provides that the discharge may be contested at any time within two years from the date thereof, on the ground that it was fraudulently obtained. That time (the date) must then, in my judgment, be taken as the time when the cause of action accrues."

In the case of *In re Brown*, *4 Fed. Cas. 338*, *Case No. 1983*, decided in 1879, Judge CHOATE,

after discussing *Bailey v. Glover*, held that the language of the 34th section of the bankruptcy act was not capable of the "enlargement by construction that has been found possible in statutes of limitation generally." He thus expresses the reasons for his conclusion at p. 339:

> "The words used are positive and explicit. They differ from the words usually defining a limitation of suits, and I think they were designedly used to fix an absolute period of time when the question of the validity of the discharge would be set at rest, and when the debtor and those again trading with him might safely treat his discharge from his old debts as final."

The court, in the *Exploration Company case*, appreciated the force of the decisions in *Pickett v. McGavick* and *In re Brown*, and attempted to distinguish them by saying that the statute on which they relied "stands in the same position as statutes relating to the time in which appeals may be taken." This statement is not persuasive or particularly important. It is a comparison and not a distinction. All statutes of limitation stand in such a position and the ascertainment of that fact does not relieve us from determining what the statutes mean and whether their bar is fixed

or movable. Ordinarily statutes fixing the time for appeals are made inflexible in order that judgments may become final. In enacting the statutes now under consideration it was the obvious purpose of Congress to promote the repose of titles by making government patents immune from attack at the end of a fixed period. The language employed to accomplish this purpose is as definite and inflexible as that of the 34th section of the bankruptcy act or of the usual statute limiting the time of appeals.

The cases we have been discussing leave no doubt as to the true meaning of *Bailey v. Glover*. Its decision was based on an *interpretation* of the words "from the time the cause of action accrued," and not upon the assertion that a court of equity has the inherent right to modify or disregard the plain words of a statute. For this reason there is no merit in the argument, urged by the courts below in the present case and in the *Exploration Company case*, that no distinction can be made between a limitation dating from the accrual of the action and one dating from the issuance of the patent. Their view seems to have been that both limitations are identical, as both starting points are the same. This assumption of the identity in starting time

of the two limitations rejects the only ground upon which *Bailey v. Glover* and other similar cases can be logically sustained and indicates that the courts below must have taken those cases as authority to arbitrarily suspend the operation of an unambiguous statute.

While, in strictness, both starting points are probably the same, the fact remains that the courts have not considered them to be the same, but have held the first to be movable according to when the cause of action was discovered. It is not illogical and does no violence to the language of the statute involved in *Bailey v. Glover* to say that an action "accrues" to a plaintiff when he discovers that he has one. But it is not logical or fairly possible to say in our own case that the date of the discovery of the fraud is the date of the "passage of this act" or the date of the "issuance of such patent."

The failure to fully understand that courts of equity have no inherent power to disregard statutes directly controlling their proceedings, as do the statutes now in question, and that their apparent exercise of such a power has been in cases where the statute applied by analogy only or by its words permitted such power, has given rise to the miscon-

ception that equity may toll the application of any statute of limitation. There is no real foundation for the exercise of such a power to veto the declaration of the legislature either in suits by private persons or by the government. But, as we have pointed out, the courts which now assert the right to suspend the operation of the act of 1891 do not directly claim this veto power, but accomplish what we consider to be the same thing by the application of an "equitable principle" supposed to govern all suits in which fraudulent concealment exists. Under the following heads in this brief we shall point out that this "equitable principle" is an inseparable part of the body of rules concerning laches and that it is applicable only to private suits.

(*d*) *Equitable rules qualifying the application of statutes of limitation in private suits are an inseparable part of the general doctrine of laches.*

1. We have already seen that courts of equity have enforced a practical limitation from the earliest times by denying relief to negligent claimants, without the assistance of any statute, and that they have made use of law statutes of limitation by analogy only. The refusal to treat such statutes as controlling was not dis-

obedience of any law. It was merely the refusal to adopt in particular instances the standard of time that governed the law courts.

2. Prior to and after 1623 the controlling consideration determining whether a plaintiff should be given relief in a court of equity on an apparently stale demand was whether he, the *plaintiff*, had been diligent in seeking relief. No matter how great the initial fraud of the defendant or unconscionable his later concealment of it, the plaintiff was denied the right to proceed when it appeared that he had slumbered on his rights.

The conduct of the defendant was but an incident affecting the good faith and diligence of the plaintiff, who might fairly be excused for long delay if he could show that his cause of action had been concealed so well that ordinary diligence would fail to discover it. But in no case did the conduct of the defendant alone, irrespective of the plaintiff's diligence, serve to defeat the plea of laches. In every case the ultimate question was whether the plaintiff had been diligent or not. The enactment of statutes of limitation governing actions at law did not change the situation so far as this ultimate question was concerned.

Reference can be here made to only a few of

the many authorities sustaining the above proposition that the conduct of the *plaintiff* is the determining factor in every case where it is sought to avoid the bar of some statute of limitation capable of being thus avoided. Notwithstanding the conduct of the defendant, it is invariably held that the bar of laches begins to run, not only from the time the plaintiff discovered the fraud, but from the time he ought to have discovered it. "Whatever is notice enough to excite the attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. Where a person has sufficient information to lead him to a fact he shall be deemed conversant with it." *Kennedy v. Greene, 3 Myl. & K., 722.*

This Court, in the case of *Stearns v. Page, 7 Howard, 819, 829,* ruled that in cases of this character there must be "distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made." In *Wood v. Carpenter, 101 U. S., 135, 143,* this Court said: "There must be reasonable diligence; and the means of knowledge are

the same thing in effect as knowledge itself. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence." And in the case of *Bailey v. Glover, 21 Wallace, 342, 347*, although lack of knowledge of concealment was held to toll the bankruptcy limitation, it was expressly said that this ignorance must have existed "without any fault or want of diligence or care" on the plaintiff's part.

In the case of *Foster v. Mansfield, etc., Railroad Co., 146 U. S., 88, 99*, this Court said:

> "The defence of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

See also to the same effect: *Pearsall v. Smith, 149 U. S., 231, 236; Beaubien v. Beaubien, 23 Howard, 190; Kirby v.*

Lake Shore, etc., Ry. Co., 120 U. S., 130, 138; Norris v. Haggin, 136 U. S., 386, 392; Felix v. Patrick, 145 U. S., 317, 332; Hardt v. Heidweyer, 152 U. S., 547, 558; Wetzel v. Minnesota Ry. Co., 169 U. S., 237, 241.

The ordinary rule in courts of equity is to refuse relief on stale claims. The authorities cited above, which are typical, show that a plaintiff may except himself from the application of this rule by clearly showing facts excusing his delay. Concealment of the fraud or other cause of action by the defendant is a valid excuse for delay, provided the plaintiff could not have sooner discovered the facts by the exercise of ordinary diligence. In short the right to proceed with the suit at all depends on the plaintiff's diligence.

There is no separate or distinct equitable rule permitting the maintenance of a stale suit merely because of the defendant's fraud or concealment. Such fraud or concealment is relevant only to the question of whether the plaintiff has been negligent.

The importance of this elementary proposition must not be lost sight of in the consideration of the question now before this Court. The government is now endeavoring to qualify a definite statutory limitation of the time when it

must bring its suits by means of an "equitable principle" borrowed from the rules concerning private suits. In doing so, it has overlooked the fact that the supposed "equitable principle" it seeks to apply in its own favor is not an independent rule but merely a qualifying condition to be considered only as it affects the plaintiff's diligence.

When thus arbitrarily separated from its proper connection, this supposed principle is capable of being mechanically applied to government suits. The obvious objection to such use being made of it is that it is not a rule of law by itself. It is law only in its proper fitting as one of the qualifying incidents of the equitable code of laches. We have endeavored to emphasize the true character of the effect of fraudulent concealment or lack of discovery and to show that this effect is without legal significance except as it concerns the question of the laches of the plaintiff. This is preliminary to showing that, inasmuch as laches cannot be attributed to the government, none of its incidents can qualify the application of statutes of limitation cutting off government suits. The only way by which they can be made to thus qualify the statute is by separating them from the environment in which

they have been developed in suits between private litigants and by so changing their intrinsic equitable character as to make them apply in favor of the government but not against it. Congress alone has power to do this.

(*e*) *The equitable doctrine of laches is not historically or practically applicable to suits by the government.*

1. The entire equitable doctrine of laches has developed in the enforcement of purely private rights. The attempt to apply any portion of its rules to suits by the government necessarily involves us in such difficulties as arise from the marked difference between sovereign and private remedial rights. For the purpose of the present discussion attention need be called only to that phase of laches which concerns the effect of concealment or lack of discovery of the cause of action.

In suits between individuals the question of concealment or lack of discovery is inseparably bound up with the inquiry concerning the plaintiff's diligence. Equity aids only the vigilant and always inquires, if the suit is delayed, whether the plaintiff knew or ought to have known his cause of action sooner.

Therefore, if the mere creation of the limitation contained in the Act of March 3, 1891, carried with it the implied adoption of the equitable rules concerning concealment or lack of discovery, it must be conceded that these rules were so adopted in their entirety. There is nothing to indicate that Congress intended to adopt them in an emasculated form. If they were thus impliedly adopted in the form in which they had grown up, Congress unwittingly overturned the rule that the negligence of its agents can not be imputed to the government.

2. There is no logical escape from this conclusion, since, under the effect of this borrowed "equitable principle," every inquiry concerning fraudulent concealment in a government suit must involve a concurrent inquiry to determine whether the government knew or ought to have known its cause of action sooner. An omission of this latter inquiry as to the negligence of the government would be a judicial repeal of an essential portion of the very rule invoked as authority for the first inquiry.

3. It is not to be assumed, without clear evidence in the words of the statutes themselves, that Congress intended to bring about such a strange situation. Even if the element

of negligence is eliminated, the immense practical difficulty of determining what is notice to or knowledge by the government must have appealed to the framers of these acts and induced them to fix a limitation measured by the lapse of time alone. The difficulty of determining what is negligence on the part of the government is even greater.

If the equitable rule invoked by the lower court in the present case is applied to suits by the government in an altered form, consistent with the immunity of the government from laches or constructive knowledge, the result is a virtual repeal of the acts of 1891 and 1896, since suits to cancel patents might then be brought at any distant time. The government could postpone the bar of the statute at will by simply postponing the acquirement of full knowledge of the cause of action until it was ready to file suit. This was the very thing that Congress endeavored to avoid.

4. The embarrassments and difficulties that must result from the attempt of the Circuit Court of Appeals in the present case to read something into the act of 1891 that does not belong there, are well illustrated by two recent district court

decisions, each of which endeavored to apply the act in its judicially qualified form.

The first of these cases is *United States v. Lee Wilson & Co., 214 Fed., 630*, decided by Judge TRIEBER of the Eastern District of Arkansas on February 20, 1914. This was a suit to quiet the government title to a large area of land claimed to have been fraudulently meandered, and which the holders of adjacent lands endeavored to hold as incident to their patents. The defendant company was one of these claimants. It pleaded the statute of 1891, and the court, after saying that the statute was not involved because the government was not attempting to vacate any patent, proceeded to dispose of the defense on the merits, saying :

> " As the fraud, even if we assume mistake, of the original survey was not discovered by the department of the government charged by law with the management of the public lands until December, 1908, when the Secretary of the Interior made his findings as hereinbefore set out, and the motion for review of that decision was not disposed of until February 27, 1909, the statute did not begin to run until that time " (*p. 648*).

This hearing in 1908 was a regular contest before the land department in which evidence was received on the very issues that were presented to the court (*p. 638*). The suit was filed in 1911. A letter written by the Secretary of the Interior in 1902 to the Commissioner of the General Land Office showed that prior to that time a special agent of the government had made an investigation showing substantially the facts upon which the fraudulent character of the survey was determined.

The court disposed of this report and of the evidence of early knowledge shown by the Secretary's letter by saying that " such a communication made by a subordinate employee of the department, who is not even an officer of the United States, * * * without authority from the department, and merely expressing his own opinion, without having taken any evidence or made any personal investigation upon which his opinion is based, can hardly be said to be notice to the government, which can only act through its officers, and for that reason is not chargeable with notice as strictly as an individual" (*p. 649*).

Notwithstanding this criticism of the report of the special agent and its effect, the letter of the

Secretary of the Interior written in 1902, and quoted at page 649 of the court's opinion, seems to indicate that the Secretary himself got very full information from the report. Yet the court finds that this was not enough to start the statute running. Even a formal hearing and decision by the Secretary of the Interior in 1908 was not enough, for the court finds that the statute did not begin to run until an application for a rehearing had been disposed of in 1909.

We have referred to this decision at some length because the practical effect of its dictum concerning the time when the bar of the statute would begin to run is to discard all question concerning notice or means of knowledge and to say that the bar does not begin to run until there has been a final determination of the existence of all the facts in the form of an executive ruling.

Such a decision entirely destroys the effect of the statute. In the usual case no occasion would arise for a hearing or an executive finding of the facts or it could be withheld at the will of the government until suit was ready to be filed. Judge TRIEBER'S entire discussion of the statute of limitations is an attempt to reconcile the rule of the *Exploration Company case* with the rule

that the government is immune from the charge of negligence or imputed knowledge. The logical failure of his attempt is due to the basic incompatibility of the two rules.

In marked contrast with this decision is that of Judge NETERER of the Western District of Washington, in the case of *United States v. Puget Sound Traction etc. Co.*, *215 Fed.*, *436*, decided June 20, 1914. This was a suit, started on February 9, 1914, to cancel a mineral patent issued June 30, 1894. It was charged in the bill that the land was not mineral and that the patent to it had been fraudulently obtained for power site purposes. The bill attempted to excuse the delay in bringing the suit by pleading fraud and concealment by the defendants so that the government remained in ignorance of the real facts until 1910. On a motion for a more specific statement, under Equity Rule 20, the court held that the bill was insufficient because there were no facts alleged "from which the court would be justified in concluding that the government was not negligent or was not lacking in diligence in failing to make the discovery within the statutory period" (*p. 439*). In reply to the contention of the government

that no showing as to diligence could be required of it, the court said :

> " The statute here in question was enacted for the very purpose of binding the government. By its very terms it compels the government to suffer by the negligence of its agents or officials. If a patent is obtained fraudulently, and knowledge of the fraud is possessed by the government officials within the statutory period, and yet they negligently fail to bring an action to set it aside until after the period has expired, can we say that such negligence is not imputable to the government ? To do so would be to deny the existence or binding force of the statute and to accomplish the repeal of a congressional enactment by the process of judicial construction. The statute is absolute in its terms. It says that actions to annul patents shall only be brought within six years of the date of their issuance. The equitable rule of concealed fraud, qualifying the absolute terms of the statute, was ingrafted upon it by judicial construction. It was, however, the rule as developed, defined and expounded by courts of equitable jurisdiction which was thus imported into the statute, and not an emasculated and mu-

> tilated remnant of that rule; a comprehensive legal principle, not a legal paradox. Equity recognizes no such doctrine as that the statute of limitations will be tolled by mere ignorance unaccompanied by a showing of due diligence or concealment of fraud. How, then, can it be read into the statute as a rule of equity?" (*p. 441*).

If the statutes of 1891 and 1896 are to be applied other than according to their strict letter, we must take one of the two divergent courses presented in these district court decisions. Judge TRIEBER, accepting the decision of the *Exploration Company case* in his own circuit, chose to apply this equitable principle borrowed from private suits in such a way as to deprive it of its essential character through the elimination of all inquiry as to the plaintiff's negligence.

Judge NETERER was likewise bound by the similar decision in his own circuit in the case now on appeal. But he applied the borrowed equitable rule according to its true meaning and thereby surprised the government by placing it in a position it had never occupied before. If the result he reached is wrong the error does not lie with him, for his course was the only one logically possible in obedience to the decision of his superior court. If the government now de-

sires to borrow this "equitable principle" from private suits in order to avoid the effect of its own delay, it must be prepared to accept the loan with all its incidents.

The truth of the matter is that Congress did not intend or authorize either of the situations we have just been discussing. It recognized the fundamental difference between public and private suits and knew that existing rules controlling private suits were unsuited to government suits. The object Congress sought to attain was absolute, not approximate, certainty of titles. This object could be attained only by fixing a definite time when patents should no longer be questioned.

The statutes of 1891 and 1896 were passed to accomplish this object. They fixed a time distant enough to furnish a reasonable opportunity for investigation by the government. They were passed in the light of the conceded fact that public policy forbade the raising of questions of laches against the government and without any intent to alter that policy. In addition, the practical impossibility and undesirability of imputing notice to the government from the knowledge of its agents must have had its influence.

Under these circumstances Congress employed language in these acts which was appropriate only to a defined and certain limitation. It could not have been the purpose of Congress to make this limitation uncertain by dependence on the diligence of the government or the fraud of a defendant. It may be assumed that Congress did not desire to secure to dishonest patentees the results of their frauds. It recognized that occasional instances of successful concealment might occur. It thought, however, that in the vast majority of cases six years would be long enough to detect such frauds. It also knew that lapse of time had its dangers for honest patentees, and that innocent acts often bore the aspect of fraud as time dimmed or destroyed the evidence of their true character. It therefore fixed a definite limitation, believing that the ultimate certainty of titles would more than compensate such occasional losses as might result from successful concealment.

Conclusion.

Reduced to its true basis, the decision of the court below in the present case is an attempt to do substantial justice, in what it considered to be

an inequitable situation, by judicially amending the definite limitation fixed by Congress. It has done this by means of the unauthorized application of part of an equitable rule that can have nothing to do with government suits.

We have shown by the evidence of its own proceedings that it was the purpose of Congress to create a definite limitation in order to avoid the serious evil of titles being forever uncertain. The language of these statutes is appropriate for the accomplishment of this purpose and is consistent with no other purpose. Interpretation cannot vary it. Courts of equity were intended to be bound by it and have no legal right or power to disobey it. The plausible expedient of importing into this language from private litigation a rule that concealment or lack of discovery may suspend the legal bar has been shown to be without logical or legal sanction. We therefore respectfully submit that the decision appealed from is erroneous in its ruling concerning the application of the Act of March 3, 1891.

JOSEPH PAXTON BLAIR,
CHARLES R. LEWERS,
Amici Curiæ.

Appendix "A."

PROCEEDINGS OF CONGRESS CONCERNING THE ACT OF MARCH 2, 1896.

(From Volume 28, Congressional Record. Original page numbers appear in brackets.)

[1760] HOUSE OF REPRESENTATIVES

SATURDAY, February 15, 1896.

EXTENSION OF TIME IN WHICH SUITS MAY BE BROUGHT TO VACATE AND ANNUL PATENTS UPON PUBLIC LANDS.

MR. LACY: Mr. Speaker, I desire to present a privileged report from the Committee on Public Lands.

The bill was read, as follows:

"A bill to provide for the extension of the time within which suits may be brought to vacate and annul patents upon public lands, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a special grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within ten years after the date of the issuance of such patents. But no [1761] patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed.

"SEC. 2. That if any person claiming to be a *bona fide* purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a *bona fide* purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be less than minimum Government price thereof, nor more than the amount paid by the purchaser to the original grantee of the United States, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the *bona fides* of such claimant shall not be conclusive of his rights, and if such claimant or one claiming to be a *bona fide* purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a *bona fide* purchaser, the court shall decree a confirmation of the title and shall render a decree in behalf of the United States for the value of the land as hereinbefore provided. Any *bona fide* purchaser of lands patented or certified to a railroad company, and who is not made a party of such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such *bona fide* purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in sections 3 and 4 of chapter 376 of the acts of the second session of the Forty-ninth Congress.

"SEC. 3. That if at any time prior to the institution of suit by the Attorney-General to cancel any patent

or certification of lands erroneously patented or certified, a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations is a *bona fide* purchaser or are *bona fide* purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a *bona fide* purchaser as aforesaid, or that such persons or corporations are such *bona fide* purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land, as hereinbefore specified."

Amendments recommended by the committee were read, as follows:

"Line 4 of section 1, after the words 'under a,' insert the words 'railroad, Mexican, Spanish, or other.'

"Also, after the word 'patents,' in lines 8 and 9, insert 'and the limitation of section 8 of chapter 561 of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to.'"

MR. LACEY: Mr. Speaker, I ask for the present consideration of this bill.

52,778 acres, in which the company just organized was named as grantee, one deed embracing the land in each county (925-37; 1250-51; 1270). On June 9, 1906, Smith laid these deeds before the board of directors with a proposition to deliver them to the Company in consideration of its capital stock. The proposition was accepted by appropriate resolution (968-9), the deeds delivered, and the stock of the Company issued to Smith, with the exception of two shares, which were issued one each to Mrs. Smith and to Mr. Lind.

At this same meeting of the board resolutions were adopted to have the Company comply with the requirements of the laws of Oregon for doing business in that state as a foreign corporation (969). These resolutions were immediately carried into effect by filing an authenticated copy of the articles of incorporation, a declaration of purpose to do business in Oregon, and a power appointing a resident agent; and on June 25, 1906, the secretary of state for Oregon issued to the company a certificate that it had "furnished satisfactory evidence of its legal existence and its authority under the laws of its domicile to engage in the occupation, business or pursuit stated in said declaration, and that it had paid the declaration and annual license fees required by law," etc. (948-963; 1395-98).

Smith went abroad, leaving Minneapolis about June 11th, 1906, and did not return until the following October (1334), and the legal title to the 4,480 acres in controversy, standing—as we have seen—in the name of Nils O. Werner, was not con-

veyed to the Company until August 15, 1907, but on that day a deed from Werner and his wife to the Company was executed and delivered (945-7), thereby completing its title to the entire 52,778 acres in the three counties.

The share of stock issued to Mr. Lind was transferred by him to Smith's son, Vernon A. Smith, on January 8, 1907 (979), the date of the first annual meeting of the stockholders (950). The new board of directors then elected consisted of Smith, his wife and this son, Vernon (970). The minutes of this meeting show that, "In view of the fact that the corporation had no funds, and did not desire to dispose of any of its lands, Mr. C. A. Smith proposed to advance the money needed to pay the taxes and other necessary expenses from time to time as required, all advances made by him to draw interest at six per cent (6%). This proposition was accepted by the board" (970). The officers elected were Mr. Smith, president; Mrs. Smith, vice president; Vernon Smith, secretary, and Smith's daughter, Nann A. Smith, treasurer (970).

At the next annual meeting of the Company, held January 14th, 1908, the same board and officers were re-elected. The stock was held as before, namely, 998 shares by Smith, one share by his wife, and one by his son (971). The stock of $100,000 being issued in payment for 52,778 acres of land, the land was capitalized only for about $1.90 per acre, and the stock was of more than face value.

The financial stringency of 1907 affected Smith very seriously. He says: "I was a heavy borrow-

er, owing a great deal of money during the latter part of 1907 and the early part of 1908, and on account of the financial flurry I found myself unable to borrow as much money as I needed, and in many cases to renew obligations which I had" (1335-6). He was a director of the Swedish-American National Bank of Minneapolis—a bank with a capital of $500,000 (1363), and on February 14th, 1908, he was owing the bank upwards of $330,000 (1301). He says * * * "After the panic in the fall of 1907, sometime in the fall or winter, or possibly it may have been in the spring, the records will show that it was decided by the directors that all directors and officers that owed the bank money should put up collateral security for the bank, and I put up in February—I don't remember whether the resolution was passed before the middle of February or not, but the middle of February I put up $30,000 of the stock of the Linn & Lane Timber Company" (1362-3). The records of the Company show that the 300 shares of stock referred to were transferred to the bank on February 14th, 1908 (979-80). The Revised Laws of Minnesota, 1905, Sec. 2863, provide that, "A pledge of stock transferred as collateral security shall be entitled to a new certificate if the instrument of transfer substantially describes the debt or duty intended to be secured thereby. Such new certificate shall state on its face that it is held as collateral security, and the name of the pledgor, who alone shall be liable as a stockholder and entitled to vote thereon." In compliance with this statute there

was issued to the bank on the date referred to a new certificate for the 300 shares reading, "This certifies that the Swedish-American National Bank of Minneapolis is the owner of 300 shares of $100 each of the capital stock of the Linn & Lane Timber Co., which it holds as collateral security for advances and loans made and to be made to Charles A. Smith, pledgor" (979-80).

On February 15, 1908, Smith sold and transferred 15 shares of the stock to Charles J. Johnson, for $21,000 cash, and 150 shares of stock in another company (980, 1274-5). The price indicates that in the sale (assuming the stock in the other company to have been taken at par), the land of the timber company was then valued at $45.50 per acre. The cash consideration represented $26.50 per acre. Smith also on February 28th, 1908, pledged 10 more shares to Charles J. Swanson as collateral for a loan of $5,000 (980-81; 1274; 1224-6; 1335). From this date until October 31st, 1908, the status of the company remained as follows: Smith, owner of 985 shares; Johnson, owner of 15; 300 of Smith's shares pledged to the Swedish-American National Bank for about $330,000, and 10 pledged to Swanson for $5,000.

The financial situation necessitated a "timber bond" issue by one of Smith's companies, the C. A. Smith Timber Company of Marshfield, Oregon, on lands in southwestern Oregon and California (1336). To the amount of $400,000 these bonds were also pledged to the Swedish-American Bank about April 1st, 1908 (1316-17; 1336). But in or-

der to reduce his indebtedness to that bank and meet other obligations Smith wanted these bonds released from the pledge so they could be sold (1361-2). He was then owing the bank $337,240.45, and Johnson, to whom he had sold fifteen shares, was owing the bank $56,450 (1299). To obtain the release, it was arranged on October 31st, 1908, under appropriate resolution on the part of the stockholders and directors of the defendant company that Smith should pledge to the bank additional 210 shares of that company, 208 direct to the bank and one each to B. F. Nelson and C. C. Wyman, who, as trustees for the bank, should go on the board of directors and take respectively the offices of president and secretary; that Johnson should also pledge his 15 shares for his indebtedness, thereby giving the bank 525 of the 1,000 shares and the control of the Company until the debts of both Smith and Johnson should be paid, it being provided that the trustees should have the right to vote the 525 shares (972-94). In the contract with the bank it was said that—"It is intended that the 525 shares thus pledged to the bank, the same constituting more than a majority of the stock of said timber company, shall give the pledgee such control that no indebtedness or liability on the part of the timber company should be contracted without the consent of the pledgee until the indebtedness to the pledgee is fully paid" (990).

The status and stock of the company thereafter remained as last stated, except that on November 28th, 1908, the Northwestern National Bank of

Minneapolis succeeded to the interest of the Swedish-American (994-1000; 1297), and except that partial payments were made to the latter bank so as to reduce Smith's indebtedness to $143,714.95, and Johnson's to $42,950 (1300).

While Heney and Burns were investigating the entries and taking affidavits from the entrymen in January, 1905, Puter, as a result of his threats to have Smith indicted, procured payment of what he claimed due him on the redwood lands in Humboldt county (690), but he became incensed anew against Smith on account of an interview, published in the Minneapolis Journal (787), and from that time on he exerted himself to the utmost to procure the Government to bring suit to set aside the patents. He first published a book under the title of "Looters of the Public Domain" (738), in which he stated that the entries had been made pursuant to an arrangement between himself and Smith; information to the same effect he lodged with the Secretary of the Interior (708, 712), and even called in person on the President (716) and was in attendance on the district attorney aiding and urging the commencement of suit (713). On the stand he was forced to admit that much of the information so given was false, and made for the purpose of securing and hastening the bringing of suit to annul the patents (712, 715-16, 739, 787-8). He succeeded in having this done, and a bill was filed for that purpose in the Circuit Court for the Oregon District on May 25th, 1908 (5-24). To this bill Smith and the persons in whose names he had held the title,

and the entrymen, were made parties, but the Linn & Lane Timber Company was not made a party, probably because the deeds of June 4th, 1906, and August 15th, 1907, from Smith and Werner respectively, conveying the lands to it had not then been recorded.

Although the bill was filed May 25th, 1908, process was not served on Smith until August 11th, the last day for bringing suit under the act of March 3rd, 1891, 26 St. 1093, the patents having been issued August 12th, 1902.

Kribs and some of the entrymen filed a plea to the bill on September 5th (36-40) and Smith and Werner filed a plea on October 8th, 1908 (42-6). These pleas set up the title of the Linn & Lane Timber Company to the land, and were to the effect that this company was a necessary and indispensable party. The Government did not join issue on the pleas or set them for argument, but took *ex parte* orders permitting it to file an amended bill, and pursuant to these orders it filed an amended bill on November 16th, 1908, making the Company a party defendant (49-76). Process was served on the Company on the same day (76-80).

The amended, as well as the original, bill charged Smith and the persons in whose names the title had been held prior to the conveyance to the Company, with conspiring with Puter to procure the entries to be made, and charged that the entrymen had filed pursuant to agreements that the title acquired should enure to the benefit of Smith, etc. Answers were filed by Smith and Werner (82-100)

and by the Company (100-118) denying the conspiracy and all averments of fraud. Both answers furthermore set up that Smith and the Company were respectively innocent purchasers (108, 113) and the Company set up the act of March 3rd, 1891, in bar, the suit having not been brought against it within six years after the dates of the patents (100-1). Replications were filed to these answers July 8th, 1909 (118-121) and the case set for final hearing April 18th, 1910 (121).

At the opening of the trial the Government asked leave to amend the bill by alleging that the value of the land at the time of the issuance of the patents was $225,000, and at the time of the trial $400,000, this with a view to a recovery against the entrymen and the other defendants of a money judgment if the patents could not be set aside. The amendment was allowed provisionally over defendants' objections (122-127). Answer to this amendment was filed by the Company, Smith and Kribs (127-30) and the trial of the case proceeded, part of the testimony being taken orally in open court and part by a special examiner.

In taking the testimony much evidence was admitted under the conspiracy averment, and under the amendment for the recovery of damages, evidence otherwise not competent or material against the defendant company or Smith. The evidence failed, however, entirely to show any conspiracy on the part of Smith, or any one representing him, in connection with the entries; as already pointed out, it appeared affirmatively that Puter did not

bring the land in controversy to the attention of Smith or Kribs until after the entries were made. That no conspiracy on Smith's part was shown was tacitly admitted by the district attorney (796), and no conspiracy was found by the court in deciding the case. In the decision the court, moreover, disallowed the amendment to the bill as to the value of the land and the Government's rights to recover damages (1418), but held all the entries fraudulent and found that Kribs was Smith's agent and had notice of the frauds; that Smith was chargeable with such notice and was therefore not an innocent purchaser. The court also held that the suit was not barred on account of having been commenced against the Company more than six years after the date of the patents (1399-1418). The decision was filed September 12th, 1910, a decree vacating all the patents was entered October 20th (136-43), and from this decree the Linn & Lane Timber Company and Charles A. Smith appealed to the United States Circuit Court of Appeals for the Ninth Circuit, having first taken the usual steps to require the other defendants to join (1419-38). Upon this appeal the decree of the Circuit Court was affirmed by a decree of the Court of Appeals entered May 20th, 1912 (1450-58). From the latter decree the Linn & Lane Timber Company and Charles A. Smith appeal to this court (1458-70).

SPECIFICATION OF ERRORS RELIED UPON.

The appellants, The Linn & Lane Timber Company and Charles A. Smith, assert that the United States Circuit Court of Appeals erred in rendering the decree entered in the above entitled cause on the 20th day of May, 1912, affirming the decree of the Circuit Court of the United States for the District of Oregon, because the decree so affirmed was erroneous in the following particulars, to-wit:

(1) In declaring void, cancelling, annulling and setting aside the twenty-eight patents of August 12th, 1902, described in the decree. This was error because the suit was barred by the Act of Congress of March 3rd, 1891, 26 St. L. 1093, the same not having been commenced against the Linn & Lane Timber Company, the owner of the title granted by the patents, within six years after the date of the patents, as required by said act.

(2) In declaring the deeds and conveyances described in the bill to be in fraud and violation of, and subject to some right of the complainant, and cancelling, annulling and setting aside such deeds and conveyance.

(3) In enjoining and restraining defendant, The Linn & Lane Timber Company, its agents, servants and employees, from asserting, exercising or exerting any authority or control over the lands described in the decree, or any of them, or over or in relation to the title to said lands, or any part thereof, by virtue of the deeds and conveyances of said lands described in the bill.

(4) In declaring the lands described in the decree to be the property of the complainant in fee simple, divested of all right, title or estate in law or equity claimed or asserted by defendant, The Linn & Lane Timber Company.

(5) In declaring that complainant is entitled to the immediate possession of all of the lands described in the decree.

(6) In failing to dismiss the bill. This was error because the suit was barred by the Act of Congress of March 3rd, 1891, 26 St. L. 1093, the same not having been commenced against The Linn & Lane Timber Company, the owner of the title granted by the patents described in the decree, within six years after the date of the patents, as required by said Act.

(7) In not dismissing the bill because of failure to prove the conspiracy charge therein against Charles A. Smith, or Nils O. Werner, or Robert F. Greacen, or Hubert F. Rogers, or Frederick A. Kribs, or John A. Willd, or S. A. D. Puter.

(8) In not dismissing the bill because of complainant's failure to prove that Charles A. Smith, when he purchased the land described in the decree, had notice of some of the alleged conspiracies, frauds or irregularities complained of in the bill in connection with the entries on said lands.

(9) In not dismissing the bill on the ground that Charles A. Smith, for a full and adequate consideration, had purchased the lands described in the decree from the persons who had entered and purchased the same from the complainant, with no

notice or knowledge of any of the alleged conspiracies, frauds or irregularities complained of in the bill in connection with the entries on said lands, but in good faith, believing said persons could rightfully and lawfully sell and convey said lands, and had thereafter, before the commencement of the suit, conveyed said lands to The Linn & Lane Timber Company.

(10) In not dismissing the bill on the ground that the entries of the lands described in the decree had been fully investigated under the direction of complainant's secretary of the interior, by officers of his department, with reference to all the alleged conspiracies, frauds and irregularities complained of in the bill in connection with said entries, and that after such investigation, on the evidence adduced said secretary had determined and decided said entries to be in all respects lawfully made and valid, and had thereupon directed the patents described in the bill and decree to be issued.

(1) In not dismissing the bill as to the land granted by the patent to Sadie E. Puter instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Sadie E. Puter to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89) was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(12) In not dismissing the bill as to the land granted by the patent to Elvira Jacobs instead of

declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Elvira Jacobs to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(13) In not dismissing the bill as to the land granted by the patent to H. C. Barr instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said H. C. Barr to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(14) In not dismissing the bill as to the land granted by the patent to S. A. D. Puter instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said S. A. D. Puter to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(15) In not dismissing the bill as to the land granted by the patent to John J. Jaggy instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said John J. Jaggy to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made

or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(16) In not dismissing the bill as to the land granted by the patent to Neal D. Dozier instead of declaring the patent void. This was error because the evidenec did not show that the duplicate written statement of said Neal D. Dozier to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(17) In not dismissing the bill as to the land granted by the patent to Zebulin Smith instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of Neal D. Dozier to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(18) In not dismissing the bill as to the land granted by the patent to Thomas Wilson instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Thomas Wilson to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(19) In not dismissing the bill as to the land granted by the patent to John L. Green instead of declaring the patent void. This was error because

the evidence did not show that the duplicate written statement of said John L. Green to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(20) In not dismissing the bill as to the land granted by the patent to J. S. Phillips instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said J. S. Phillips to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(21) In not dismissing the bill as to the land granted by the patent to Charles Burley instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Charles Burley to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(22) In not dismissing the bill as to the land granted by the patent to Charles Barr instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Charles Barr to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the require-

ments of Section 2 of said Act.

(23) In not dismissing the bill as to the land granted by the patent to Edward Finley instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Edward Finley to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(24) In not dismissing the bill as to the land granted by the patent to Douglas Adkinson instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Douglas Adkinson to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(25) In not dismissing the bill as to the land granted by the patent to Harry Saltmarsh instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Harry Saltmarsh to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(26) In not dismissing the bill as to the land granted by the patent to Jennie Moulton instead of declaring the patent void. This was error because the evidence did not show that the duplicate writ-

ten statement of said Jennie Moulton to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(27) In not dismissing the bill as to the land granted by the patent to George L. Thompson instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said George L. Thompson to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(28) In not dismisisng the bill as to the land granted by the patent to Isaac R. Borum instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Isaac R. Borum to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(29) In not dismissing the bill as to the land granted by the patent to Benjamin F. Kirk instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Benjamin F. Kirk to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(30) In not dismissing the bill as to the land granted by the patent to Hugh Blakely instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Hugh Blakely to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(31) In not dismissing the bill as to the land granted by the patent to James B. Cooley instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said James B. Cooley to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(32) In not dismissing the bill as to the land granted by the patent to Frank W. Burford, instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Frank W. Burford to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(33) In not dismissing the bill as to the land granted by the patent to John Harrison instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said John Harrison to purchase

said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(34) In not dismissing the bill as to the land granted by the patent to Henry B. Blakely instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Henry B. Blakely to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(35) In not dismissing the bill as to the land granted by the patent to Peter Buffington instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Peter Buffington to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(36) In not dismissing the bill as to the land granted by the patent to Jacob W. Stillwell instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Jacob W. Stillwell to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

(37) In not dismissing the bill as to the land granted by the patent to Elam Miller instead of declaring the patent void. This was error because the evidence did not show that the duplicate written statement of said Elam Miller to purchase said land under the provisions of the Act of Congress of June 3rd, 1878 (20 St. L. 89), was made or filed fraudulently or contrary to any of the requirements of Section 2 of said Act.

ARGUMENT.

What the Courts Below Have Decided in This Case.

The validity of the twenty-eight patents in question was attacked by charging violation of the act under which the lands were purchased ("An act for the sale of timber lands in the states of California, Oregon, Nevada and the Territory of Washington," approved June 3, 1878, 26 St. L. 89). Under this act a citizen, or a person who had declared his intention to become a citizen, was entitled to purchase not to exceed 160 acres of land chiefly valuable for timber or stone at $2.50 per acre, but was required in a sworn application to state, among other things, that the land was unfit for cultivation, was valuable chiefly for timber or stone, was uninhabited, was believed to contain no valuable deposit of certain specified minerals, and that he had made no other application to purchase. In the amended bill it was charged that the applications to purchase were false and fraudulent as respects the quality of

the land and as to the applicants not having made previous applications to purchase (63), but no proof in support of these charges was offered, nor were the qualifications of the patentees as citizens or persons who had declared their intention to become citizens brought in question. The bill, however, charged a violation by each of the patentees of that part of section 2 of the act which required him to state under oath in the application to purchase "that he does not apply to purchase the same (the tract described) on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the United States shall inure, in whole or in part, to the benefit of any person, except himself." The bill alleged, in substance, that each patentee at the time of filing had an agreement with Puter to convey the land to Smith (57-8), and that the agreement was made and carried out pursuant to a conspiracy between Puter, Smith, Kribs and others (51-7). This conspiracy averment was denied (83, 101), and the evidence utterly failed to sustain it. As shown in our statement of the case, the evidence was conclusive that the lands did not come to Smith's attention until about a month after the last entry was made. The attorney for the government admitted this on the trial, stating: "I concede that most of the filings, at least, were made before any negotiations were entered into connecting the

defendants Kribs and Smith with the transaction" (796). The lower courts accordingly could not find and did not find, that Smith, or anyone representing him, had anything to do, directly or indirectly, with the fraud (if any there was) in the entries. The suggestion in the opinion of the Court of Appeals (1452) that Kribs as Smith's agent "was an active participant in the frauds upon the Government" has no reference to this case, but to the other case covered by the opinion (See opinion of the Circuit Court, page 1413). When the Linn and Lane Timber Company was brought in and made a party more than six years after the date of the patents, it was alleged in the amended bill filed for that purpose, in substance, that in May, 1906, Smith had organized that company, and conveyed the lands in question to it without recording the deeds, "to defraud and deceive this complainant and prevent complainant from recovering said lands."

The Circuit Court held that (1) all the entries were fraudulent (1405); that (2) the decision of the Secretary of the Interior prior to the issuance of the patents upon the charges of fraud in the entries then made did not affect the Government's right to have the patents set aside (1413); that (3) Smith was not an innocent purchaser, because "whether (he) had actual knowledge of the fraud or not, Kribs was his agent, authorized to purchase the property, and whatever knowledge Kribs acquired is chargeable to Smith" (1413); and (4) that the act of March 3, 1891 (26 St. L. 1093), was not a bar to the suit, although commenced against

the Linn and Lane Timber Company more than six years after the date of the patents, because "Smith was the corporation and the corporation was Smith" (1414-18).

The Court of Appeals held that (1) all the entries were fraudulent (1452); that (2) Smith could not be regarded as an innocent purchaser because of the knowledge of his agent, Kribs (1452); that (3) the statute referred to was not bar, (a) because "one at least of the purposes for which it (the Linn and Lane Timber Company) was formed was to conceal fraudulently therein the title to the lands which are the subject of the suit and to keep the titles so concealed until the time when the statute of limitation should bar the anticipated suit of the government to set aside the patents" (1454), thereby presenting a case where a court of equity should look through the form to the substance and hold that "the corporation is Smith" (1456), and (b) because the statute did not run from the date of the patents but from the time of the discovery of the fraud.

We will present our views as to the correctness of these conclusions, and take them up in the order stated.

I.

The Evidence of Fraud in the Entries was not Sufficient to Justify a Decree Vacating the Patents.

From the outset the legal and political conception in this country has been that the title of the public domain is held by the Government in trust for the people; and it has been a fixed policy to have the title transferred to the individual citizen as fast as a demand for the use of the lands should arise, either at a nominal cost or entirely free. Generally speaking, it has been the policy to get the lands into the hands of the largest possible number of citizens, and with agricultural lands this policy has been successful. The economic conditions have been in favor of the small farm, and as a result the large grants of agricultural lands to the railroads have been gradually cut up into smaller and smaller holdings. If one should compare settlements where the title has come direct from the Government to settlements where it has been derived through railroad grants, no essential difference would be found in the size of the farms. Congress evidently expected that the lands "valuable chiefly for timber and stone," if parcelled out the same as agricultural lands under the homestead or preemption law, could and would be held and used the same, that is to say, that the patentees, would retain the title and put the lands to their own personal use. But an inexorable economic condition has made this impossible. As a single holding, a

quarter section of timber lands in the mountains of the Pacific States is utterly valueless for the owner's personal use, while it may have a considerable value to the capitalist who can build and operate railroads, saw mills and other equipment necessary for utilizing the timber. Any legislation to diffuse the private ownership of these lands the same as agricultural lands would necessarily have been futile.

The interpretation of the act in *United States v. Budd*, 144 U. S. 154; *Williamson v. United States*, 207 U. S. 425, 460; *United States v. Biggs*, 211 U. S. 507, 525, read in connection with *Adams v. Church*, 193 U. S. 510, and *Hafeman v. Gross*, 199 U. S. 342, is familiar. Any citizen or person who has declared his intention to become a citizen is entitled to purchase 160 acres, but must make oath that he has made no agreement by which the title is to enure to the benefit of anybody else and a fraud on the Government consists in an agreement prior to the application in conflict with this oath, but an agreement to sell may be made any time after the application is on file. The agreement denounced may be so indefinite and vague considering that it is to sell something which has not yet been acquired, that practically speaking, the purchaser is called upon to make oath to his sincerity of purpose—to his mental attitude—for the moment. It is difficult to imagine anything more pernicious in legislation, than thus to tempt people in dealing with their government to make useless, false oaths—tempt them because of the natural

disposition to reconcile intention to interest, and tempt them uselessly because it can make no difference to the Government, either as a fiscal matter or as a policy in favor of a diffused individual ownership, whether the agreement to sell is made the day before or the day after the filing of the application to purchase.

It is a general rule that misrepresentations must have caused some injury to the complainant in order to be material and sufficient cause for vacating a contract (*Atlantic, etc., Co. v. James*, 94 U. S. 207, 214), and if that rule was applicable here, a false statement in the application to purchase as respects an agreement to alienate the title would not be sufficient in equity to warrant the setting aside the patent, considering how utterly immaterial to the Government it is whether or not such an agreement is made before or just after the filing of the application. But it is conceded that the Timber and Stone Act itself defines what is to constitute actionable misrepresentation or fraud in sales under its provisions and what the effect thereof is to be. Section 2, after specifying what is to be stated under oath in the application to purchase, says:

"And if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury and shall forfeit the money which he may have paid for said lands and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void."

It is conceded that by this provision Congress has made every fact required to be stated in the application to purchase equally important, however immaterial some of them may be in themselves, but it is plain, on the other hand, that the statement which is to make void the title acquired must be such as to constitute perjury, hence that it must be wilfully false. The entrymen must swear without reservation that the land is unfit for cultivation and is valuable chiefly for its timber or stone, but Congress manifestly has not intended that an honest mistake of fact in this respect is to make him guilty of perjury. Fraud in the entry depends hence upon the entryman's good faith. If he wilfully misstates the facts upon which his right to purchase depends he commits perjury and the sale is void except as to *bona fide* purchasers; but if he states what he honestly believes to be the facts, he is NOT guilty of perjury and the entry is not in violation of the act.

The entrymen here were all qualified purchasers and the land was of the prescribed quality. The inquiry as to each entryman should, therefore, be whether in view of his connection with Puter and McKinley, he committed perjury in stating that "he had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should enure, in whole or in part, to the benefit of any person except himself."

The district judge, after stating briefly what was done by Puter and McKinley, says: "It is clear that none of the applicants took the land for their own use and benefit, but for the use and benefit of Puter and McKinley." Looking at the matter from the standpoint of Puter and McKinley this is true. But to make this a determining factor on the question of fraud is to charge the entrymen with what Puter and McKinley did, and this should not be done. Their acts are only material in so far as they may tend to show the statements in the applications of the entrymen to have been wilfully false. An entryman making oath to an application to purchase, believing that he is stating the truth is certainly not guilty of perjury, because he happens to be induced to become a purchaser by some one who is scheming to get the land. So we contend that while the acts of Puter and McKinley and their agent Tarpley should of course, be considered in determining whether the entrymen falsely negatived the existence of an agreement to sell, due weight must be given to Puter's testimony that his scheme in connection with these entries (like in another instance described in his book) was to have—

"a clean cut agreement with each locator whereby I was to charge $150 (here $100) as my filing fee, with the understanding that I would find somebody willing to loan $600 on each claim at the time of making final proof the locators agreeing to execute a mortgage on their claims for that amount as security for the loan. This mortgage was to run one year at ten per cent interest annually, and it was

provided further that my location fee was to be deducted from this loan. * * * Under no circumstances whatever were the locators to offer their claims for sale before making final proof and that neither the person advancing the $600 nor myself had any intention of purchasing the lands after the locators had acquired final title. In general terms, I sought to create the impression that good faith was to be observed all around in the transactions involving the acquisition of title to these lands" (745).

Due weight should also be given to Tarpley's testimony that the arrangements with entrymen which he made were made in accordance with this plan (412-13, 416-17, 425-28) and to McKinley's testimony to the same effect as far as he was concerned (587). We feel justified in claiming for the evidence that it shows that Puter planned carefully to so deal with the entrymen that they might truthfully say they had made no agreement to sell, and that McKinley and Tarpley (who made the arrangements with all the entrymen except four, p. 583), endeavored to deal with them in the same way. Of course, they may not have adhered to the plan in all instances; some of the entrymen may in fact have made such bargain with them as to render their application to purchase wilfully false; but in searching for the truth in this respect we should start out from the premise that we have before us a transaction in which clever men endeavored to deal with simple-minded men in such a way that the latter might act in perfect good faith. Insofar

as this was successfully accomplished the entrymen were not guilty of perjury or fraud.

Eleven entrymen and entrywoman were examined as witnesses, ten for the Government, namely, Puter, Wilson, Findley, Phillips, Saltmarsh, Harrison, Moulton (now Mrs. Lovejoy), Henry Blakely and Luella Beeman (now Mrs. Ingersoll), and one, Buffington, for the defendants. Of the other seventeen, two were dead, namely, H. C. Barr and Jaggy, and the rest were not called, namely, Mrs. Puter, Elvira Jacobs, Zebulon Smith, Charles Barr, John L. Green, Charles Burley, Douglas Adkinson, Isaac R. Borum, Benj. F. Kirk, Geo. L. Thompson, Jacob W. Stillwell, Elam Miller, Frank W. Burford, James B. Cooley and Hugh Blakeley.

Six of these entrymen lived at Brownsville, the home of McKinley, namely, Henry W. Blakeley; his son, Hugh Blakeley; John Harrison, Frank Burford, James B. Cooley and Jacob W. Stillwell. We will review briefly the testimony of the two who were called as witnesses, namely, John Harrison and Henry W. Blakeley.

Harrison was working as a painter, had evidently heard that timber claims were being taken and that McKinley was a locator, for he called on the latter and said, "I would like to get a claim" (490), to which McKinley answered, "All right, we run on them sometimes" (490). Later on, Harrison says, "he (McKinley) telephoned me that there were seven claims up above Mealey's that we could get, and I might see some of the rest of the boys and if we wanted them now is the chance to get

them" (490). Harrison thereupon called on Blakeley (338), a farmer and old resident in the neighborhood (336), who had known McKinley several years (337), and told him of his talk with McKinley (338). Blakeley said he wanted one of the claims, and called McKinley up on the telephone and asked him "what there was in them timber claims" (338). McKinley answered: "About $75; there ought to be more than that in it; he didn't know whether there was or not" (338). "If you don't sell me this claim you can sell it to anybody else that will give you the most for it, but you got to pay me the location fee if you let anybody else have it" (348). Harrison says, "When he phoned to us * * * I believe I asked him how much there was in it, or how much I could make out of it. He said there was $75 in it and he didn't know how much more. * * * He says, "Whatever you can make out of it, but," he says, "there was $75 above expenses and government price of the land" (493). McKinley also telephoned that he would meet them at Mealey's (the man who was furnishing descriptions at $10 per quarter section). Blakeley thereupon went around to Burford, Cooley, Stillwell, and his son, Hugh, and told them of this talk with McKinley, and these men with Harrison and his son thereupon went with Blakeley's team to Mealey's where they met Tarpley, who took them into the timber and showed them the corners of the seven claims, designating which one each of them could have (340). They returned home and after a while went together with Blakeley's team to Hal-

sey, the nearest railroad station, to go to Roseburg and file, evidently by appointment with McKinley, for he telephoned Blakeley not to purchase railroad tickets as he (McKinley) was getting special rates (341). McKinley joined them on the train, paid their fares both ways and their hotel expenses, attended to the publication of the notices of final proof and the payment of the publication fees, and probably notified them when to appear at the land office to make final proof (343). They went together again to Roseburg for that purpose, McKinley again paying their expenses. Upon having made proof they executed respectively a note and mortgage running to Kribs to cover the purchase money to the Government, the fees and expenses incurred and the $75 spoken of a location fee. At Roseburg in the evening of the day when the final proofs were made and the mortgage given, six of these entrymen (it does not appear what became of Frank Harrison's entry) discussed between themselves whether or not to sell, some being in favor of selling and some opposed (350, 506-7), and they inquired of one Judd Mealey about selling at a better price than the $75 which they seemed to consider as a standing offer from McKinley (350, 496-7). Mealey said, "he was not in shape to buy" and said to Blakeley "If the rest want to sell I advise you to let yours go" (350). They thereupon determined to let the land go to McKinley, evidently under what they considered his standing offer, and the single men in the party executed deeds before leaving Roseburg and the married men at their homes

at Brownsville a few days later, all deeds running to Willd. In the affidavit which Blakeley made before Stratford, March 11, 1902 (1132, 1136), there are two statements which are not accurate, namely, that he had paid Tarpley a locating fee of $50 (1133), and "I sold the land to Willd" and got for it "about $800." In Harrison's affidavit of the same date (1145-1148) it is said: "I sold it (the land) to John A. Willd" and received for it "near $800." These statements may be criticized for lack of frankness. It is probable that some statement by McKinley about having to pay Tarpley for showing the claims may account for Blakeley's statement that he had paid Tarpley $50; otherwise his affidavit is in effect true. The affidavits they made before Burns, December 29th, 1904 (1213-16), are in accordance with their testimony on the stand, omitting the details. They deny having intended to defraud the Government (367). Blakeley's sincerity is shown by his worry after final proof, lest he might not have been upon the identical quarter section entered when he was in the timber with Tarpley (360). He says he thought at the time that what he did was perfectly legitimate and lawful and adds "but I have thought different since." When Stratford was taking his affidavit "I began" he says, "to wish I had never seen the claim, and have been wishing that ever since (368). I wanted to make some money out of the claim. I was born and raised there. I never used my right. A lot of fellows were coming in and taking up all the time, and I would get in first opportunity" (357). His

sincerity so impressed the district attorney that he remarked to the statement quoted, "Yes, that is all right, I don't blame you for that" (357).

In connection with the testimony of these two men must be considered Puter's plan, already referred to, and McKinley's testimony as to what he did to carry it out, which is as follows:

"That talk (with entrymen) varied a little in cases. Now, there would be like the case of Mr. Wilson there—I had known him a long time, and if I should happen to be a little rushed—I had other business on hand of a different nature, and I was in a hurry on account of those Northern Pacific people being up in there and I knew this was a rush matter—a delay of a day or two might mean that it would knock us out, perhaps, of this proposition, and for that reason why, I was considerably rushed all the way along at the time of the entry. * * * I might have said (to Wilson) 'You go on down and use your timber right' and he would go. I would say 'I have a piece of timber here. You go down and file on it and you can make some money on it. I will act as your agent in the matter and help you all I can and you will get $75 anyway,' and let it go at that and say nothing further about it. There might have been that arrangement made with two or three other parties that I knew well, and I would not go into the details. There were other cases where I would explain about this mortgage."

(After referring to the arrangement between himself and Puter).

"At that particular time when we was talking of it then we was to put this purchase money ourselves there—they thought we were—we would file these people on the land, agree to advance them $75, put in $100 location fee, from $75—$100 as we figured it out—$425 or $435, I think it would cost to obtain title to the land from the Government,

and sum it up all around it would be about $500 —so we called it $600, and Mr. Puter himself told me to go and see these parties, get them under that arrangement and acting along these lines I did that and told a great many of the entrymen that we would take a mortgage for $600; but in no instance —they can't say so, nor no one else—was ever anything said at the time of entry that they should deed the lands over to me or sell them to me or any one else. I knew they would be for sale, but as to myself handling them that was a mere chance. I might be able and some other man might step in at the right moment. Q. * * * Didn't you expect, by reason of the arrangement, that you would probably have the handling and the selling of these lands and the profits there was in them? A. Yes, yes, I can say I did. I can say I did. Q. Didn't you really feel that notwithstanding there was no talk about a sale or anything of that kind * * * in the natural course of events, this title would be disposed of by you eventually? A. Yes, I did. I understood that for several good reasons. These men were—I was acquainted with them, knew the locality of timber, knew who owned timber, on the north, east and the south. I had sold myself hundreds of thousands of acres—two whole townships south of these tracts to my people back east and I thought I would have the first chance. They would naturally give me, as I went ahead and allowed them to make some money out of it, if I would be fair with them all the way through, they would naturally give me the first, the preference right, if the lands were for sale; that when they came to talk sale they would give me the preference right in place of some outsider to handle the lands and if they did I thought I was in position, buying and selling at the time and dealing quite largely—that I could find a buyer either with my people in La Crosse, Wisconsin, or any one outside. Q. When did it first become a matter of discussion between you and Puter to take the deeds at the time of proof, or as soon as you could get the deeds—as soon as they could be obtained? A. On the day of proof.

The day when the parties—the first parties proved up" (585-89).

We shall not undertake to review the testimony of the other entrymen and entrywomen who were called as witnesses, but simply state that a prior agreement to sell is denied by Wilson (259), Finley (282-3), Dozier (329-32), Phillips (460, 465-6), and Buffington (1002-3), and that the testimony of Harrison and Blakeley is, in our judgment, more favorable to the Government than that of any of these five. We concede that the testimony of Mrs. Ingersoll (Luella Beeman), Mrs. Lovejoy (Jennie Moulton) and Harry Saltmarsh made a stronger case of fraud as to their respective claims than did the testimony of Harrison and Blakeley as to theirs. We have reviewed the testimony of Harrison and Blakeley because McKinley asserts that he did not go so fully into details with persons with whom he was well acquainted as with the rest and we think that this is likely to have been the case with Harrison and Blakeley whom he knew well, as they lived in the same village; also because Harrison and Blakeley's testimony carries the conviction that they state their arrangement and understanding with McKinley fully as favorable to the Government as the truth warrants.

The gist of the evidence as to Harrison and Blakeley is this: They were old settlers in the vicinity of these lands; found that timber claims were being taken up through McKinley; had never exercised their rights to purchase under the Timber

and Stone Act; felt they had the right to avail themselves of the privileges of that act; inquired of McKinley to ascertain whether they could get a chance to do so and whether it would be worth while; were given to understand that he would locate them and advance on the security of the land the costs and expenses and sufficient to give them $75 in money, the mortgage also to cover $75, which would be his location fee if they kept the land or sold it to others but the purchase price, in addition to the costs and expenses advanced, if they should sell it to him, they to be at liberty to sell it to others or keep it as they might see fit.

Upon this state of facts were Harrison and Blakeley guilty of perjury and fraud when they verified the application to purchase? We think this should be answered in the negative.

The arrangement to mortgage the land for the purchase money and expenses connected with the entry is not forbidden (*Hafemann v. Gross*, 199 U. S. 342). "All that is denounced is a prior agreement, the acting for another in the purchase" (*United States v. Budd*, 144 U. S. 154, 163). If the entryman takes the oath in good faith in the sense that he is purchasing for himself and not for anybody else, he is not guilty of perjury or fraud. Blakeley and Harrison could do this notwithstanding statements from McKinley indicating a standing offer to purchase, and so could the others who did not even put that interpretation upon what he said.

It may be that the entryman who may have understood McKinley to make a standing offer to purchase, and who had determined in his own mind that he would avail himself of it, could not in good faith take the required oath, but the evidence does not show this to have been the case with any of the 28 entrymen, except, possibly, Luella Beeman, Jennie Moulton, Harry Saltmarsh and Puter himself. In the light of Puter and McKinley's plan and method of dealing with the entrymen, the action of all, except, possibly, the four named, is consistent with good faith, and fraud should not be imputed. It is especially true of those who were not called as witnesses, for instance, Mrs. Puter. As to her the evidence is simply that she filed January 19, proved up April 18, conveyed April 23, and that she is the wife of S. A. D. Puter. She may be the best of women and may have taken the oath with scrupulous honesty. The district attorney no doubt had reasons for calling such witnesses as Mrs. Beeman and omitting to call such as Mrs. Puter. It is safe to infer that he called those whose testimony would furnish the strongest proof of fraud. The evidence of fraud in cases of this kind "must be clear, unequivocal and convincing," and not "a bare preponderance of evidence that leaves the issue in doubt" (*Maxwell Land Grant Case*, 121 U. S. 325, 380; *Colorado, etc., Co. v. United States*, 123 U. S. 307, 321; *San Jacinto Tin. Co. v. United States*, 125 U. S. 273, 299; *United States v. Budd*, 144 U. S. 154, 161; *United States v. Stimson*, 197 U. S. 200, 204). The evidence of fraud, at least as

to twenty-four of the entries, does not come up to this requirement.

II.

The Question of Fraud in the Entries was Conclusively Decided by the Secretary of the Interior.

In our statement of the case we have shown that the General Land Office was informed as early as February 26th, 1900, that Puter and McKinley were connected with the entries. Whether this connection was such as to make the entries fraudulent was thenceforth under investigation by the Land Department until the Secretary of the Interior on May 17th, 1902, relieved the entries from suspension and directed patents to issue. The principal facts disclosed by the evidence before the Circuit Court from which fraud on the part of the entryman might be inferred were before the Secretary (832-845). Special Agent Mathers had reported that the entries were made "at the instance of one Horace G. McKinley of Wisconsin, who was acting in the interest of Stephen Puter of Portland" (806) and that he (Mathers) had been informed by the entrymen "that McKinley had induced them to make the applications, promising to pay all expenses, and after entry was made either to buy the land himself or find a purchaser for it, so that the entrymen would make $40 or $50 a piece and perhaps more, from the transaction" (824). Strathford had reported as the result of his investigation that "I am frank to

say that I have some reason to believe that every one of these entries were and are fraudulent" (1186). Green had reported that—

"The financial agent of this man (Willd) was Frederick A. Kribs of Portland, Oregon; the cruiser was Horace G. McKinley, who was also the locator and induced the entrymen to take up the lands, representing to them that a mill company stood ready to take them off their hands as soon as final proof could be made and that he wanted only such applicants as would be ready to sell when the time came. * * * In 28 of the 67 cases referred to in this connection the lands were mortgaged to Kribs on the day of final proof; eight tracts were mortgaged to him one day after final proof and one tract three days after proof. Twelve tracts were deeded straight to Kribs on the day of proof and 28 tracts were deeded to Willd within five days after proof" (918-9).

Green had also furnished transcripts from the county recorder's office of the mortgages and deeds executed by the entrymen (834, 919-920). The Secretary's decision (832-845) shows knowledge and due consideration on his part of the facts and circumstanecs from which fraud might be inferred. The case is, therefore, we think, within the rule laid down by this court in *United States v. Throckmorton*, 98 U. S. 61, governing the conclusiveness of decisions of this character and their binding force on courts. In the case of *Johnson v. Drew*, 171 U. S. 93, the court, speaking by Justice Brewer, said (p. 99):

"But whether a party was or was not in possession of a particular tract at a given time is a question of fact, depending upon parol testimony; and if there is any one thing respecting the administra-

tion of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts. The law in reference to this matter was summed up in the case of *Burfenning v. Chicago, St. Paul, etc., Railway*, 163 U. S. 321, 323, as follows: 'It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony, and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts except in those cases of fraud, etc., which permit any determination to be re-examined. *Johnson v. Towsley*, 13 Wall. 72; *Smelting Company v. Kemp*, 104 U. S. 636; *Steel v. Smelting Company*, 106 U. S. 447; *Wright v. Roseberry*, 121 U. S. 488; *Heath v. Wallace*, 138 U. S. 573; *McCormick v. Hayes*, 159 U. S. 332.'"

See also *Greenameyer v Coate*, 212 U. S. 434.

The decision of the Land Department in a matter properly before it is as conclusive upon the Government as it is upon the individual. *United States v. White*, 17 Fed. 561.

If it be suggested that Strathford, the special agent, was corrupted, and that the decision of the Secretary for that reason does not come under the rule in the *Throckmorten case*, the answer is that while his actions in soliciting and receiving small loans from Kribs (1031-3) were reprehensible in

the highest degree in point of propriety, his report December 28th, 1901, asking to be relieved (827), and his final reports, recommending the cancellation of several of the entries covered by his investigation (838), and proffering a like recommendation as to the 28 here involved if the Commissioner of the General Land Office should so desire (1186) show that his action was not influenced to the prejudice of the Government; and, furthermore, there is no charge in the bill that he was corrupted, or that the decision of the Secretary was induced by his misconduct. All the bill contains on that subject is found in the amendment of August 6th, 1910, where it is averred that some of the defendants "secured the respective entrymen and entrywomen * * * to execute and subscribe affidavits and depositions in which it was falsely set forth and represented, in effect, to the complainant that each of said entrymen and entrywomen respectively had entered the land in good faith," etc. (134). Granting that the affidavits referred to were not in all respects accurate, the rule is, that notwithstanding false testimony, or forged documents "the decision of the proper officer of the department is in the nature of judicial determination of the matter in dispute." *Vance v. Burbank*, 101 U. S., pp. 514-519.

If for any reason the decision of the Secretary can be said not to come within the rule in the *Throckmorton case*, the investigations of the land department and the decision of the Secretary of the very questions now litigated should certainly have persuasion probative value in support of the validity

of the entries. What was known or plainly suggested to the Land Department before the patents were issued, a court of equity should not consider a fraud on the Government. It is so held by this court, in the case of *United States v. San Jacinto Tim. Co.*, 125 U. S. 273. In that case a forgery was the fraud charged and Justice Miller said (p. 299): "We consider this examination of the case in the office of the Commissioner and its re-examination by the Secretary of the Interior as possessing the very strongest probative force in regard to the question of fraud which was mooted before them."

III.

Charles A. Smith was a Bona Fide Purchaser From the Patentees.

Attention has already been called to the fact that Kribs went to the Coast on his own behalf about February 1st, 1900 (1009), and engaged in purchasing timber for himself and for various persons other than Smith (1011, 1052, 1055-6); that at the time of his departure he had an understanding with Smith to the effect that he would keep Smith informed of opportunities to buy timber lands and that if Smith should avail himself of such opportunities Kribs' compensation for his services should be based upon the acreage acquired (1009-10) and that this compensation was afterwards fixed at 27½ cents per acre (849-52, 1052). When in March, 1900, it was arranged between Puter and Smith that Kribs should go to Oregon and exam-

ine the lands, Kribs' authority to purchase was probably implied, but the terms of the agency as respects Kribs' compensation were in accordance with the arrangement referred to. Kribs, as we have seen, came to Oregon on April 1st (474, 542, 1015), met McKinley and examined the lands, then took up negotiations with Puter resulting in his agreeing to make a loan of $600 to each entryman to be secured by mortgage and later he agreed to buy the lands at $5.25 per acre. The last deeds were taken May 19th (1443). Smith was 2,000 miles away. He returned east after the meeting between the parties in San Francisco in March and did not come back to the coast until May 21st (710, 774, 1341-4). He then ascertained that the lands were not patented and he knew nothing about the details of Kribs' and Puter's negotiations, and nothing about Kribs' having furnished money to prove up or that mortgages had been taken (1353-5). The evidence is uncontradicted that Smith personally had no notice or knowledge of any fraud, or of anything indicating fraud, in connection with the entries (1345-47). The price of $5.25 per acre was full value, and was more than what it would have cost to get similar lands by scrip (597-8, 1033-4, 1337-8, 1365-6). Kribs testifies that he acted on advice of attorney and that he took the mortgages and deeds in good faith (1022, 1025), but the district judge after reviewing the evidence (1407-13), concludes that his knowledge of the Northern Pacific contest, of McKinley's arrest, etc., was sufficient notice to him of the frauds on the part of the

entrymen as found by the court. "It may be true," says the judge, "that Smith, his principal, had no actual knowledge of such frauds, although the evidence would be more satisfactory upon that point if the correspondence between himself and Kribs and Puter concerning this transaction had not all been destroyed about the time the matter was being investigated by a federal grand jury and it was rumored or reported that Smith and Kribs were liable to be indicted and that the Government was contemplating bringing a civil suit to cancel and set aside the patents. But whether Smith had actual knowledge of the frauds or not Kribs was his agent authorized to purchase the property and whatever knowledge Kribs acquired was chargeable to Smith. I conclude, therefore, that Smith was not a *bona fide* purchaser for value and without notice of the fraud and cannot claim the right to such in this suit" (1413). The judge inadvertently makes the statement that correspondence with Puter was destroyed for the record shows that every letter and telegram called for was produced and many of them were put in evidence by the Government. The facts are, as shown by the record and the extract from the decision quoted, that so far as Smith personally is concerned the purchase was in perfect good faith and the lower courts held him not to be a *bona fide* purchaser only because they considered that there was sufficient notice to his agent and that Smith was chargeable with that notice.

We believe the lower courts erred in applying to this case the rule that notice to the agent is notice to the principal. The rule rests on the presumption of fact that the agent has warned the principal against everything known to his disadvantage. But the rule has no application when the transaction is of such character that the interest of the agent conflicts with that of the principal. The agent is not presumed to impart information which it is for his own interest to conceal. The exception to the rule is stated by Judge Sanborn in *Pine, etc., Co. v. Bailey,* 94 Fed. 258, p. 261, as follows:

"In consonance with this principle of the law of agency, the rule that notice to the agent is notice to the principal has an exception as well established as the rule itself. It is that when the agent acts for himself, in his own interest, and adversely to his principal, in a given negotiation or transaction, neither notice to nor the knowledge of the agent can be lawfully imputed to the principal. *Surety Co. v. Pauly,* 170 U. S. 133, 156, 18 Sup. Co. 552; *Frenkel v. Hudson,* 82 Ala. 158, 2 South. 758; *Waite v. City of Sanata Cruz,* 89 Fed. 619, 630; *Barnes v. Gaslight Co.,* 27 N. J. Eq. 33, 37; *Winchester v. Railroad Co.,* 4 Md. 231, 241; *Davis Improved Wrought Iron Wagon Co. v. Davis Wrought Iron Wagon Co.,* 20 Fed. 699, 702; *Thomson-Houston Electric Co. v. Capital Electric Co.,* 56 Fed. 849, 853; *Bank v. Cunningham,* 24 Pick. 270, 276; *Mechem. Ag.,* Sec. 723. The reason of the general rule is that it is the duty of the agent to communicate to his principal the facts relative to any transaction in which he acts on his behalf, and that the law presumes that he has discharged his duty. But when the nominal agent commences to act in his own interest, and adversely to his principal, the presumption no longer obtains that he will communicate to him facts which might prevent the consummation of the negotiation which he is conduct-

ing on his own behalf, and the counter presumption that he will conceal them arises. As the reason for the rule no longer exists, the rule ceases to apply, and the exception prevails."

In the case cited from 170 U. S., page 156, Justice Harlan says:

"The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf."

Kribs' interest in having the largest possible acreage purchased and his position as the entrymen's mortgagee bring the case within the exception. The compensation for services—his profit from the transaction—depended upon the lands being purchased. His position in this respect was what the position of a broker for the entrymen would have been. The money which he had received from Smith and deposited in bank to his own credit he had used without authority in making loans on mortgages running to himself. If the title of the entrymen was defective the loss would fall on him, unless the lands were sold on terms that would liquidate and satisfy the mortgages. A sale of the lands to Smith was to him 27½ cents per acre, or $1,232; no sale meant nothing. A sale meant that mortgage loans

for about $15,000 would be paid; no sale meant that he would have to account for the money used in making the loans and suffer a heavy loss if the titles proved defective. The conflict of interest was here more real and substantial than in most of the cases which are held not to come under the rule of a presumed communication of notice because of the adverse interest of the agent.

The presumption when the agent is not adversely interested, is indulged in as a matter of policy and can, therefor, not be contradicted. A person is charged with notice to his agent the same as he is charged with notice of public records. It is merely constructive notice.

It, therefore, becomes material to inquire whether the saving clause in the Timber and Stone Act in behalf of *"bona fide* purchasers" should be construed strictly and technically so as to charge the purchaser with constructive notice, or whether it should receive the same construction that has been given to similar language used in all other acts of Congress designed for the protection of purchasers.

In construing the term *"bona fide* purchaser" as used in the Act of March 3, 1887, and also in the Act of March 2, 1896, this court in the case of *United States v. Winona, etc., Railroad,* 165 U. S., at page 477, said:

"It is earnestly contended by the Government that the present holders of the title are not *'bona fide* purchasers'; that that term has a fixed and well defined meaning as announced in the frequent decisions of this and other courts; that, as said in 2 *Pomeroy Equity Jurisprudence,* paragraph 745, the

essential elements which constitute a *'bona fide* purchaser' are, therefore, three—a valuable consideration, the absence of notice and the presence of good faith; * * * that while two of these essential elements may be found, to-wit, a valuable consideration and the presence of good faith, the third, the absence of notice is lacking; that all men are conclusively presumed to know the law; etc. * * * We are unable to agree with this contention of counsel for several reasons: In the first place the situation as it was known to exist makes against any such narrow construction. While instances of such fraudulent conduct on the part of the state to which the lands were certified, or the company to which the lands were patented, might exist, yet in the nature of things they would be few and hardly worth the special notice of Congress, while on the other hand, the fact that there had been a difference between the land department and the courts, one construction obtaining in the former prior to the decisions by the latter, and the further fact that by this difference of construction many tracts had been erroneously certified or patented, must have been well known to Congress, and naturally therefore a subject for its legislation. Further, there was no need of any legislation to protect a *'bona fide* purchaser.' This had been settled by repeated decisions of this court. *United States v. Burlington & Missouri River Railroad Company*, 98 U. S. 334, 342; *Colorado Coal Company v. United States*, 123 U. S. 307, 313—reaffirmed in *United States v. California, etc., Land Company*, 148 U. S. 31, 41. For in each of those cases it was decided that, although a patent was fraudulently and wrongfully obtained from the Government, if the land conveyed was within the jurisdiction of the land department, the title of a *'bona fide* purchaser' from the patentee could not be disturbed by the Government, so that this provision was absolutely unnecessary if that which is now claimed by counsel for the Government is all that was intended by Congress. We do not mean to assert that because legislation to cover such a contingency was unneces-

sary, therefore the language used by Congress necessarily implies something other and different, because of course it may have been that Congress intended nothing but a simple declaration of the law as it was known to exist. At the same time the fact, that under one construction it was needless, raises a presumption that something more was intended, and that Congress had in view the protection of other parties than were already protected by general law."

And further on at page 481 the court adds:

"These being the provisions of the Act of 1887, the Act of 1896 confirming the right and title of a *bona fide* purchaser, and providing that the patent to his lands could not be vacated or annulled, must be held to include one who, if not in the fullest sense a '*bona fide* purchaser,' has nevertheless purchased in good faith from the railroad company."

In *United States v. Southern Pacific Railroad Co.*, 184 U. S. 49, the court again announced similar views and held that constructive notice did not prevent a purchaser from being a "*bona fide* purchaser" under the statutes referred to.

Language used in the Acts of Congress for the protection of innocent purchasers has always been liberally construed. This is strikingly illustrated in the case of *Fee v. Brown*, 162 U. S. 602. That case involved the location of a certificate of Chippewa scrip on a tract of land in Colorado and the validity of a patent erroneously issued on the location. Under the Act of Congress the scrip could only be located on the original reservation in Wisconsin; locations made elsewhere had been held void by the courts. Congress passed an Act authorizing purchasers of land located by scrip out-

side the reservation in Wisconsin to perfect their title by paying the government price, provided, that the Secretary of the Interior should find that they were "purchasrs in good faith." It was earnestly contended that inasmuch as the patents were void on their face and issued in violation of the Act of Congress, the holders of the scrip title could not be deemed "purchaser in good faith." The court said:

"Strictly speaking, no person who had located this scrip, except the half-breeds themselves, could be said to be purchasers in good faith, since they were apprised by the treaty and the act of December 19, 1854, that the scrip could only be located within the ceded territory by the beneficiaries therein named, and that such scrip was incapable of alienation. Congress, however, was evidently moved to use these words by the fact that this scrip had been misused by designing parties, etc. * * * But we are satisfied that it was not the intention of Congress to give it that narrow construction and that it adopted a course which, partially at least, protected the holder of the land and at the same time insured to the government a proper compensation for them."

Referring to the term *"bona fide* purchaser" as used in the second section of the Timber and Stone Act, it may well be said ,as was said by Judge Brewer in the *Winona case* above cited, that the use of the term was entirely unnecessary for the purpose of saving the rights of *bona fide* purchasers of patented lands. It has been a rule applied in every case that has been before the courts for more than a century that a purchaser from the patentee of the Government was protected if his purchase was *bona fide,* the saving clause in the Timber

and Stone Act being entirely unnecessary to protect one who is a *bona fide* purchaser in the technical sense; its presence, as suggested by Judge Brewer, "raises a presumption that something more was intended and that Congress had in view the protection of other parties than were already protected by the general law," and such has been the construction given to the term as it occurs in the Timber and Stone Act in several cases before this court.

In the case of *United States v. Detroit Lumber Co.*, 200 U. S., p. 321, lands had been acquired under the Timber and Stone Act by money furnished by the Martin-Alexander Co. and conveyance had been made to it of the timber by the entrymen as the entries were made. The lands thus acquired were on the 14th day of January, 1901, bargained to the Detroit Company, another corporation, but the written contract of sale from the Martin-Alexander Co. was not executed till March 1st, 1901. On the 14th day of January, 1901, Martin, who had been president of the Martin-Alexander Company during the acquisition of title to the lands became the president of the Detroit Company and was its president at the time of the consummation of the sale to the latter company on March 1st, 1901. It was argued by the Government that Martin, as chief executive of the Detroit Company, was chargeable with knowledge of the fraud by which the lands had been acquired, that in asmuch as he had knowledge of this fraud before the written contract for the transfer of the lands was entered into, he and the Detroit Company had constructive

notice of the wrongful character of the entries. This would certainly have been true if the protection given *"bona fide* purchasers" by the Timber and Stone Act had been strictly construed, because no rule is better settled than the one that notice (actual or constructive) of the infirmity in the title brought home to the purchaser before conveyance, or before final payment of the purchase money, is fatal to the *bona fides* of the transaction. This court refused to hold that constructive notice of that character was sufficient to destroy the *bona fide* character of the transfer and said, quoting from 6 Wall. 90:

"A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to *Sugden on Vendors*, p. 622, where he says: 'In *Ware v. Lord Egmont*, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

The court says:

"In the light of these authorities we see nothing which casts any imputation on the conduct of the Detroit Company or that tends to show that it was not a purchaser in absolute good faith."

Under the strict application of the rule governing *bona fide* purchasers, the title transferred, to protect the purchaser, must be the legal title. Pomeroy (II Equity Jurisprudence, par. 753), says:

"The rule is universal and elementary, that if a purchaser in any form receives notice of prior adverse rights in and to the same subject-matter, before he has completely acquired or perfected his own interest under the purchase, his position as a *bona fide* purchaser is thereby destroyed, even though he may have paid a valuable consideration."

"In the Detroit case last cited it was strenuously contended that inasmuch as the legal title was outstanding in the Government (no patent having issued) at the time of the transfer from the Martin-Alexander Company to the Detroit Company, there could be no *bona fide* purchase. But the court, applying the doctrine of relation, held that the conveyance prior to patent did not prevent the grantee from being considered a purchaser in good faith. Later, in the case of the United States vs. Clark, 200 U. S., 601, this court affirmed the ruling in the Detroit case that the grantee is regarded as a *bona fide* purchaser under the saving clause in the Timber and Stone Act, although he acquired only the equitable title of the entrymen at the time of the purchase, no patent having been issued. In that case the court also said, page 607: "The United States is attempting to upset a legal title. In order to do that it must charge Clark with notice of the original fraud * * * actual notice must be proved."

In the light of the language used by this court and the facts before the court in the two cases last referred to, we believe the principle to be deduced may be stated as follows: In a suit in equity brought by the Government to vacate a patent issued under the Timber and Stone Act, on account of the entryman's fraud, against a party holding the legal title who has bought the land in good faith and paid a valuable consideration, without *actual* notice or knowledge of the alleged fraud, it is not sufficient to overcome the legal title and the equities of the holder to merely establish a state of facts which in other cases involving notice or priority would constitute constructive notice. In other words, the purchaser of a title evidenced by the Government's patent should not be deprived of his property at the suit of the Government on a mere *technical* rule of constructive notice. To entitle the Government to have the title set aside and the patent vacated it must be shown that the purchaser was actually guilty of bad faith in making the purchase, or that he was guilty of "an act of gross or culpable negligence" in not ascertaining the existaece of the fraud affecting the title.

IV.

The Suit Was Barred by the Act of March 3, 1891, 26 St. L. 1093.

In reaching the conclusion that the Act was not a bar, the lower courts find or assume as facts what we earnesly contend are not facts, and these parts of the opinions we will discuss first.

A.

AS TO THE IDENTITY OF SMITH AND THE LINN AND LANE TIMBER COMPANY.

The district judge held that the holder of the legal title is an indispensable party; that he is not made a party until process is issued against him and left with the marshal for service; that the suit had to be brought within six years after the date of the patents and was not brought within that time against the Linn and Lane Timber Company. "But," he says, "the identity of Smith and the Linn and Lane Timber Company and their relation to the title to the property in controversy is such that I do not think the rule should be applied in this case. Smith is the real party in interest and the beneficial owner of the property. The corporation was organized by him as a mere holding concern. He owned all of its capital stock and the members of his family composed the board of directors and were the officers of the corporation. In fact, Smith was the corporation and the corporation was Smith" (1415).

We contend that a wholly mistaken view of the facts as well as of the law is here expressed, and we will endeavor to point this out by showing (a) the law under which the Company was organized, (b) what was done to organize under that law, (c) what business was thereafter transacted and what interest others than Smith had acquired in the Company at the time the suit was brought, and (d) the law, generally, as to the separate entity of corporations.

(a) *The law under which the Company was organized.*

In Minnesota all private corporations have to be organized under general laws (Const. Art. 4, sec. 33). The requirements of these laws (Chap. 58, Revised Laws 1905) are that "any three or more persons" shall subscribe and acknowledge a certificate stating the name, the general nature and principal place of the business, the period of duration, the names and places of residence of the incorporators, the board of directors, the names and addresses of the persons who are to constitute the board until the first election, the time when the annual elections are to be held, the amount of the capital stock, the denomination of the shares, the highest authorized indebtedness (sec. 2849); this certificate must be recorded with the secretary of state and register of deeds of the county (sec. 2850), published twice, and "upon filing with the secretary of state proof of such publication, the

(its) corporate organization shall be complete" (sec. 2851). The directors must be at least three in number (sec. 2858); there must be a president, secretary and treasurer, and the president must be a director (sec. 2859); and the capital stock must not be less than $10,000 (sec. 2868). The usual powers are conferred on corporations so organized (sec. 2852); they "may establish offices and conduct business in any other state or country" (sec. 2870). When the certificate of incorporation is recorded and published and the incorporation fee paid to the state, the secretary of state, if requested, must issue a certificate showing among other things "a compliance with all prescribed statutory provisions, and that it is duly organized and exists as a corporation under the name and of the kind specified, with the powers, rights and privileges, and subject to the limitations and restrictions pertaining thereto; such certificate shall be *prima facie* evidence of the facts stated therein" (sec. 2874).

This is all that is required to bring into existence a *de jure* corporation under the laws of Minnesota. It will be observed that "any three persons" may be the incorporators. It should also be noted that no prerequisite as to the subscription of stock is required. The capital stock (if such can be considered to exist before shares are issued) is owned and held until issued by the corporation itself. The statutes contemplate a corporation with all its attributes before a single share is subscribed or issued. This may be seen from sec. 2875 which

provides for a first meeting of the corporation on notice from one to the other incorporators "and to each subscriber, *if any,* to its capital stock"; and there is no room for claiming that persons *sui juris* are not qualified as incorporators because they belong to the same family.

The laws of Minnesota contain no provision in any way indicating how the stock in a corporation is to be held except what is referred to in the statement of the case concerning the pledge of shares and a statement in sec. 2858 that the directors are to be elected "by and from the stockholders or members." It is the well settled law of the state that the shares are personal property (*Puget Sound Nat'l. Bank v. Mather,* 60 Minn. 362), and that though there be only one stockholder, the corporate entity remains so distinct and separate from that stockholder that his deed casts not even a cloud on the corporation's title to its lands (*Baldwin v. Canfield,* 26 Minn. 43). Speaking of Minnesota corporations, the Supreme Court of the State in *Aldrich v. Press Printing Co.,* 9 Minn. 123, 126, says that they "may be composed of one man or several." In *Gallagher v. Germania Brewing Co.,* 53 Minn. 214, two persons who held all the stock of a corporation sought to set off their own demands in a suit brought against their corporation by an insolvent plaintiff. The court held that the distinction between the corporation and the holders of its stock was such that this could not be done, even in equity. Says the court:

"To allow the set-off here, it is necessary to wholly ignore the legal doctrine, or fiction, whichever you may call it, that a corporation is an entity separate and distinct from the body of its stockholders and to treat it as a mere association of individuals who are the real party in interest. In dealing with the rights of creditors and the obligations existing between the corporation and its shareholders by reason of their contract of membership, undoubtedly the courts often find it necessary to consider the real parties in interest as the individual shareholders; but it may be laid down as a rule that, except in such cases, it has been found absolutely essential, for the administration of justice, to treat the corporation as a collective entity, without regard to its individual shareholders. In no other way can the title to corporate property be kept free from complication and uncertainty. The transferable nature of stock in a corporation is also a good reason why the theory of a corporate entity should be preserved and why it is necessary to discriminate sharply between corporate rights and obligations and those of shareholders personally. If the rights or liabilities of a corporation could be affected by the acts of the stockholders, except when acting in the corporate name, or if shareholders could set up their several equities against persons having claims against the corporation, or, conversely, if claims in favor of the corporation could be set off against claims against individual stockholders, it can easily be seen into what confusion and chaos corporate affairs would inevitably fall." * * *

"Illustrations might be multiplied indefinitely to show that to recognize any such right would result in the worst sort of complications and that the only safe or sound rule is to adhere strictly, in such case, to the doctrine of a corporate entity distinct from the individual stockholders."

(See also *Winona, etc., Co. v. St. Peter, etc., Co.*, 23 Minn. 359; *Erickson v. Revere, etc., Co.*, 110 Minn. 443.)

(b) *What was done to organize the Company under the laws of Minnesota.*

On May 23rd, 1906, the necessary three persons subscribed and acknowledged a certificate containing all the statutory requirements (949-50). The general nature of the business was not stated to be that of being "a mere holding company for Smith," but "to buy, hold and sell timber and other lands and tenements in the United States of America, and to conduct forestry, mining and agricultural operations on the same; to carry on logging operations, and buy, sell, store and transport logs and other forest products for itself and others; to build and operate mills for the manufature of lumber and other wood and forest products," etc., etc. (949). That the law of the state was in all respects complied with was shown by the official certificate of the secretary of state, issued May 31, 1906, stating that "Charles A. Smith, Johanna A. Smith and John Lind, their associates and successors, are legally organized and established as, and are hereby made, an existing corporation under the name of Linn and Lane Timber Company, with the powers, rights and privileges and subject to the limitations, duties and restrictions which by law, appertain thereto" (393-4).

(c) *What business the Company transacted and what interest others than Smith acquired before the suit was commenced.*

The incorporators, who by the terms of the certificate of incorporation, constituted the first board of directors, held their first meeting June 9, 1906, having first subscribed for one share of stock each, so as to comply with the law requiring directors to be stockholders (967). The first business transacted was the election of officers and the adoption of a corporate seal (968); the next was by appropriate resolution to accept three deeds from Smith in payment of its capital stock, 998 shares of which to issue to him and one share to each of the other two directors (979). The three deeds were United States Exhibit 155 (925-37) for 41,967 acres in Linn County (1251), Defendant's Exhibit C (1384-87) for 7,440 acres in Douglas County (1551) and Defendant's Exhibit D (1388-91) for 3,371 acres in Lane County, Oregon. The first mentioned deed covered the 4,480 acres involved in this suit, although the legal title to these lands was then held by N. O. Werner.

It is said in the opinion of the Court of Appeals, referring to these three deeds, that "no minutes or other testimony are offered to show that the proposition (to deliver them to the company for its capital stock) was accepted." The court must have overlooked the resolution adopted which reads, "On motion of Mr. Lind, seconded by Johanna A. Smith, the proposition was accepted by unanimous vote

and the president and secretary were directed to issue and deliver certificates of the entire authorized capital stock in accordance with the terms thereof" (968-9). Although the Court of Appeals says in its opinion, on page 1453: "that the legal title to all of the land passed to the Linn & Lane Timber Company by virtue of the deeds executed is undisputed," yet it seems to have been in doubt as to whether the deeds were delivered, for it says, on page 1453, "no minutes or other testimony are offered to show * * * that the deeds were delivered." But the minutes and testimony do show that the corporation was named the Linn & Lane Timber Company because most of the timber lands which it was intended that it should acquire were situated in Linn and Lane counties (1328); that Charles L. Trabert, connected for many years with Smith's business (1267), was instructed by Smith to prepare deeds to the Company for the lands in Linn, Lane and Douglas counties (1286); that Trabert carried out these instructions with the assistance of the stenographer, Ethel Steel, and in so doing prepared a deed for the land in each of the three counties and carefully computed the acreage contained in each so as to apportion the consideration to be received, and make the total $100,000, the amount of the Company's capital stock (1251-1271); that the deeds were completed and executed by Smith and his wife June 4th, Trabert acting as a witness and notary (1270); that Trabert, as well as Smith, was present at the meeting of the board June 9th (1269), when, as al-

ready state, "Smith laid before the board deeds to the Company * * * and a proposition to deliver the same to the Company * * * and accept as full consideration * * * the entire authorized capital stock of the Company * * * certificates for such stock except two shares subscribed by Johanna A. Smith and John Lind to be issued to him, and the two shares subscribed by Johanna A. Smith and John Lind to be issued to them, respectively, as fully paid"; that with the deeds so before them, the board passed the resolution accepting the deeds and authorizing the issuance of the stock; that the certificates for the stock were issued June 11th (979), and that the deeds were placed by Trabert in a file-envelope marked, "Linn & Lane Timber Company," containing the Company's incorporation papers or charter (1268; 1270-1).

No particular form of delivery is required, but a word, act, or both, indicating an intention of the grantor to have the deed take effect and divest him of the title constitutes delivery (9 *Am. & Eng. Enc. of Law*, 155 and cases cited). When Smith, with the deeds before the board, offered to deliver them for the stock and the board accepted the offer and authorized the issuance of the stock and Smith thereupon took the stock and through his employe had the deeds placed and kept in the receptacle provided for the Company's papers, he intended, of course, that the deeds should operate as a conveyance to the Company. That such was his intention appears not only from what is stated, but

from other transactions to which we shall now call attention.

Under the statutes of Oregon a foreign corporation cannot do business in that state until it has filed a declaration of its purpose, containing detailed information concerning its organization, and has also appointed a resident agent (*Lord's Oregon Laws*, sec. 6726). The minutes of the board for June 9th, 1906, show that immediately after accepting the deeds, the board resolved to comply with these provisions of the Oregon laws (969). The declaration was executed by Smith as one of the officers on the same day, and was filed with the secretary of state, together with the required copy of the certificate of incorporation and of the appointment of the agent on June 25th (942-63). The secretary thereupon issued to the Company the statutory certificate (1395-98).

Had a delivery of the deeds not been intended by Smith, there would have been no purpose or object in qualifying the Company as a foreign corporation, authorized to do business in Oregon, and in paying the license fees incident thereto.

This shows plainly that Smith at this time considered that the deeds had been delivered and divested him of the title.

By a deed dated and acknowledged August 15th, 1907, Werner conveyed the legal title to the lands involved direct to the Company (945-7). The evidence did not disclose the particulars attending the delivery of this deed, but when a deed is produced by a grantee, delivery is presumed (*Secard*

v. Davis, 6 Peters, 124; *Gaines v. Stiles,* 14 Peters, 322), as of the date of the deed (13 *Cyc.* 731 and cases cited).

As shown in the statement of the case, Smith became financially embarrassed by the panic which started in the fall of 1907 (1335-6), and on February 14th, 1908, he pledged 300 of his shares in the Company to the Swedish American National Bank as security for his obligations to that bank, aggregating about $330,000 (1301). The pledge was made by a transfer of the shares on the books of the Company in accordance with the provisions of the Statutes of Minnesota (Revised Laws 1905, §2863 (979-80). On February 15th, 1908, fifteen of his shares were sold and transferred on the books of the Company to Johnson (180, 1274-5). On February 28th, 1908, he pledged additional 10 shares to Swanson for an indebtedness to the latter of $5,000 (980-81, 1335). He had pledged to the bank bonds of another company in addition to the 300 shares (1316-17, 1336), and on October 31st, 1908, in order to procure a release of these bonds and enable him to sell and realize on them, he pledged additional 208 shares to the bank. An arrangement was made by which the bank as security for his large indebtedness should hold a majority of the stock, with trustees entitled to vote it, and with the trustees members of the board of directors, so as also to control that board (972-8, 981-2, 987-94). The pledge to the bank originated in a resolution of its board requiring all its directors, of which Smith was one, to furnish collateral

for their obligations to the bank (1319, 1362).

As pointed out in the statement of the case, when the orginal bill was filed, as well as on August 11th, 1908, when the suit was actually commenced against Smith, the status of the Company was as follows: Smith was president and a director and held 673 shares of stock; Johanna A. Smith was vice-president and a director and held one share; Vernon A. Smith was secretary and a director and held one share; Nan A. Smith was treasurer; Charles J. Johnson owned 15 shares; the Swedish American National Bank held 300 shares transferred to it on the books, as security for Smith's indebtedness; Charles J. Swanson held 10 shares, transferred to him on the books for Smith's indebtedness. On November 16th, 1908, when the suit was commenced against the Company, Smith was a director and the vice-president and held 465 shares unencumbered; B. F. Nelson was president and a director and held one share as trustee for the bank; C. C. Wyman was a director and the secretary and treasurer and held one share as trustee for the bank; the bank held 525 additional shares transferred on the books, 508 as security for Smith's indebtedness and 15 for Johnson's, with the right to have the shares voted by the two trustees; C. J. Swanson held 10 shares, transferred on the books as security for Smith's indebtedness.

In view of these facts, we can see no warrant for the statement in the opinion of the Court of Appeals, page 1454, that, "He (Smith) owned all the capital stock"; that "he owned all the lands"; or

for the statements in the opinions of both the lower courts that "Smith was the corporation and the corporation was Smith" (1415, 1454). Smith *never* owned *all* the stock, for the two shares which at the outset were issued to his fellow directors, though paid for by him, were owned and held in point of law by those directors, with the double liability to creditors incident thereto under the constitution of Minnesota, Article 10, Section 3; and, of course, he did not own all the stock after the fifteen shares had been sold and transferred to Johnson or after his shares had been pledged for his debts to such an extent as to take the control of the corporation out of his hands. Moreover, the law is well settled, both in this country and England, that when a corporation is legally organized there is no privity between it and any stockholder, no matter how large the interest of the stockholder my be.

(d) *The Law, generally, as to the separate entity of corporations.*

The law under which a corporation is created determines its rights and duties (*United States v. Council of Keokuk*, 6 Wall. 514, 516); its powers and immunities (*Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 667); and its relation to its stockholders (*Glenn v. Liggett*, 135 U. S. 533, 548).

In *Van Allen v. The Assessors*, 3 Wall. 573, the court had occasion to consider the relation between

a corporation and its stockholders as respects the corporate property and said, page 584:

"The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter and the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of *Queen v. Arnoud* (2 Adolphus & Ellis, New Series, 806). The question related to the registry of a ship owned by the corporation. Lord Denman observed: 'It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase or loss from its decrease; but in no legal sense are the individual members the owners.'"

In *Hale v. Henkel*, 201 U. S. 43, where the distinction between a corporation and its stockholders was considered, the court said, page 76:

"A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. * * * It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination."

In *Merchants Nat'l. Bank v. Wehrmann*, 202 U. S. 295, the court says, page 300:

"We may assume further, in accordance with a favorite speculation of these days, that philosophically a partnership and a corporation illustrate a single principle, and even that the certificate of a share in one represents property in very nearly

the same sense as does a share in the other. In either case the members could divide the assets after paying the debts. But from the point of view of the law there is a very important difference. The corporation is legally distinct from its members, and its debts are not their debts."

In *Donnell v. Hereing, etc., Co.,* 208 U. S. 267, the court is again considering the distinction between a corporation and its stockholders and says, page 273:

"Philosophy may have gained by the attempts in recent years to look through the fiction to the fact and to generalize corporations, partnerships and other groups into a single conception. But to generalize is to omit, and in this instance to omit one characteristic of the complete corporation, as called into being under modern statutes, that is most important in business and law. A leading purpose of such statutes and of those who act under them is to interpose a non-conductor, through which in matters of contract it is impossible to see the men behind."

To the same effect *Gibbons v. Mahon,* 136 U. S. 549, 557. Here Mr. Justice Gray says:

"The distinction between the title of a corporation, and the interest of its members or stockholders, in the property of the corporation, is familiar and well settled. The ownership of that property is in the corporation, and not in the holders of shares of its stock."

In *Fitzgerald v. Missouri, etc., Ry. Co.,* 45 Fed. 812, Judge Caldwell of the Eighth Circuit had occasion to consider the distinction between a corporation and its stockholders with respect to federal jurisdiction, and said, page 818:

"The owner of all the stock and bonds of a corporation does not own the corporate property. The corporate property, which includes all rights of action and claims for damages belongs to the corporation and is subject to the management and control of its board of directors. And if it be conceded that the defendant owns all the stock and bonds of the Denver Company, that fact gives it no title to or interest in the right of way or other property of that company, which it can make the basis of an action or plea in its own behalf."

An insolvent bank had organized two corporations to take title to certain real property, the bank taking and holding their stock and their notes and mortgages. The Circuit Court of Appeals for the Eighth Circuit considered the relation resulting between the bank and these corporations and said, speaking by Judge Sandborn:

"Nor could the bank disregard or ignore the existence of these realty corporations, and convey their title to this land. It is one thing to create a corporation and another to dissolve it. It is one thing to vest title to property in a corporation. It is another to divest it. Any one may deed land to a corporation, but no one but the corporation can reconvey it. At the time this assignment was made the title to these lots was in the realty corporations. The bank had no title to them and no equitable interest in them, except that of a creditor and a stockholder of the corporation that held them. Its deed could not convey and its mortgage could not encumber the title to this land. The corporations which held it were existing entities, as distinct and separate from their stockholders and creditors as is one individual from another. They and they alone, had the power to sell, convey, mortgage and deal with the lots they held. The charters of the corporations and the law of the land denied their stockholders and creditors this privilege."

In *Oregon, etc., Ry. Co. v. Postal, etc., Co.*, 111 Fed. 842, the court held that a corporation organized under the laws of Idaho could exercise the right of eminent domain although it was owned and controlled by a foreign corporation. Judge Gilbert cites with approval *Exchange Bank v. Macon Const. Co.*, 97 Ga. 1, 33 L. R. A. 800, to the proposition that—

"One corporation owns the entire capital stock of another does not vest in the former the legal title to the property of the latter, nor render the two corporations identical; on the contrary, they are separate and distinct legal entities."

In this Georgia case the subject is carefully considered and the authorities extensively reviewed. The court says:

"Every corporation is a person—artificial, it is true, but nevertheless a distinct legal entity. Neither a portion nor all of the natural persons who compose a corporation, or who own its stock and control its affairs, are the corporation itself; and when a single individual composes a corpporation, he is not himself the corporation. In such case the man is one person, created by the Almighty, and the corporation is another person, created by the law. It makes no difference in principle whether the sole owner of the stock of a corporation is a man or another corporation. The corporation owning such stock is as distinct from the corporation whose stock is so owned as the man is from the corporation of which he is the sole member."

The subject is exhaustively discussed in *Patton v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131. The sole owner of the stock of a corporation recovered

a judgment in replevin for property owned by the corporation and the question was whether the judgment should stand. The court reversed it, because—

"From the very nature of a private business corporation, or indeed of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real though artificial person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed and disposed of. It must purchase, hold, grant, sell and convey the corporate property, and do business, sue and be sued, pleads and be impleaded, for corporate purposes, by its corporate name. * * * A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. * * * These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not therefore own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else."

See also *Cook on Corp.* (Fifth Ed.), paragraphs 6, 709 and cases cited; *Machen Modern Law of Corporations,* paragraph 1076, and cases cited.

The most thoroughly considered case is *Salomon v. Salomon & Co.,* decided by the House of Lords, A. C. 22, Law Journal, 1897, Vol. 66, p. 35. Salomon, a trader, transferred his business to a corporation, organized under the Companies Act by him-

self and six members of his family. He took all the shares except six, which were issued one each to the other incorporators. He and two of his sons constituted the board of directors. In payment for the business he took besides the shares the company's debentures for £10,000; these he pledged, and when the company failed, leaving many unsecured creditors, he claimed the surplus realized on the debentures. The chancellor and the Court of Appeal held him liable for the company's unsecured debts and held these a lien on the surplus because of fraud in over-valuing the consideration for the stock and debentures, and because the company, it was said, was but an alias for himself. But the House of Lords held there was no fraud on the company; and upon the claim of identity between Salomon and the company we quote from the opinion of Lord Chancellor Halsbury:

"The important question in this case—I am not certain whether it is not the only question—is whether the respondent company was a company at all; whether, in truth, that artificial creation of the legislature had been validly constituted in this instance; and, in order to determine that question, it is necessary to look at what the statute itself has required in that respect. I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the statute itself. Now, that there were seven actual living persons who held shares in the company has not been doubted. As to the proportionate amounts held by each I will deal presently; but it is important to observe that this first condition of the statute is satisfied, and it follows as a consequence that it would not be competent to any one, and certainly not to these persons themselves, to deny that they were sharehold-

ers. I must pause here to point out that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. One share is a sufficient qualification for each of the seven signatories. Still less is it possible to contend that the motive of becoming shareholders or of making them shareholders is a field of enquiry which the statute itself recognizes as legitimate. If they are shareholders they are shareholders for all purposes; and, even if the statute was silent as to the recognition of trusts, I should be prepared to hold that if six of them were trustees for the seventh, whatever might be their rights *inter se*, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities; and dealing with them in this relation to the company, the only relations which I believe the law would sanction would be that they were corporators of the corporate body. I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation of a company that the law should recognize only that artificial existence, quite apart from the motives or conduct of individual corporators.

"In saying this I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to show that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of *scire facias* you could not prove the fact that the company had no real legal existence. But, short of such proof, it seems to me impossible to dispute that, once the company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what

those rights and liabilities are. I will, for the sake of argument, assume the proposition that the Court of Appeal lays down, that the formation of the company was a mere scheme to enable Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself, and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.

"I observe that Mr. Justice Vaughan Williams held that the business was that of Salomon, and of no one else, and that he chose to employ as agent a limited company. And he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent—the company. I confess it seems to me that that very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is and there is not a company. Lord Justice Lindley, on the other hand, affirms that there were seven members of the company, but, he says, it is manifest that six of them were members simply in order to enable the seventh himself to carry on business with limited liability, and that the object of the whole arrangement was to do the very thing which the Legislature intended not to be done. It is obviously necessary to enquire, where is that intention of the Legislature manifested in the statute? Even if we were at liberty to insert words to manifest that intention, I should have great difficulty in ascertaining what the exact intention thus imputed to the Legislature is or was. In this particular case it is the members of one family that represent

all the shares; but if the supposed intention is not limited to so narrow a proposition as this, that the seven members must not be members of one family, to what extent may influence or authority or intentional purchase of a majority among the shareholders be carried so as to bring it within the supposed prohibition? It is, of course, easy to say that it was contrary to the intention of the Legislature—a proposition which, by reason of its generality, it is difficult to bring to the test; but when one seeks to put as an affirmative proposition what the thing is which the Legislature has prohibited, there is, as it appears to me, an insuperable difficulty in the way of those who seek to insert by construction such a prohibition into the statute. As one mode of testing the proposition, it would be pertinent to ask whether two or three, or, indeed, all seven, may constitute the whole of the shareholders; or whether they must be all independent of each other in the sense of each having an independent beneficial interest—and this is a question that cannot be answered by the reply that it is a matter of degree. If the Legislature intended to prohibit something, it ought to specify what that something is. All it has said is that one share is sufficient to constitute a shareholder, though the shares may be 100,000 in number. I am unable to get from the statute itself a limitation of that provision that that shareholder must be an independent and beneficially interested person.

"I find all through the judgment of the court of Appeal a repetition of the same proposition to which I have already adverted—that the business was the business of Salomon—and the company is variously described as a myth and a fiction. Lord Justice Lopes says: 'The Act contemplated the incorporation of seven independent *bona fide* members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader.' The words 'seven independent *bona fide* members with a mind and will of their

own and not the puppets of an individual' are by the construction to be read into the Act. Lord Justice Lopes also said that the company was a mere *nominis umbra.* Lord Justice Kay says: 'The statutes were intended to allow seven or more persons *bona fide* associated for the purpose of trade to limit their liability under certain conditions and to become a corporation. But they were not intended to legalize a pretended association for the purpose of enabling an individual to carry on his own business with limited liability in the name of a joint-stock company.'

"The learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing, if it had a legal existence, and if, consequently, the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered."

* * * * *

"The truth is that the learned judges have never allowed in their own minds the proposition that the company has a real existence. They have been struck by what they have considered the inexpediency of permitting one man to be, in influence and authority, the whole company; and assuming that such a thing could not have been intended by the Legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. I say, with the utmost deference to the learned judges, that we have nothing to do with the question whether such a result be right or wrong, politic or impolitic, if this company has been duly constituted by law. Whatever may be the motives of those who constitute it, I must decline to insert into that Act of Parliament limitations which are not to be found there."

Lords Watson, Herschell, Macnaghten and Davey gave exhaustive concurring opinions in this

case, but the reasoning being substantially the same as the chancellor's, we omit to quote.

B.

WAS THERE ANY FRAUD IN THE ORGANIZATION OF OR THE CONVEYANCE TO THE LINN AND LANE TIMBER COMPANY?

No such fraud is found or suggested in the opinion of the district judge, but in the opinion of the Court of Appeals it is said:

"There can be no doubt that one at least of the purposes for which it was formed was to fraudulently conceal therein the title to the lands which are the subject of this suit, and to keep the titles so concealed until the time when the statute of limitations should bar the anticipated suit of the Government to set aside the patents. This is shown by the fact that the possession of the deeds which apparently were executed on June 4th, 1906, and August 17th, 1907, was retained by Smith, and that he withheld the deeds from record until three and a half months after the commencement of the suit, and the further fact, that up to the date of recording the deeds, the taxes on the lands were assessed against and were paid by the grantors and not the grantee, the corporation."

A searching examination of the record will demonstrate the error in this statement as to the purpose of Smith in organizing the Company.

The court speaks of Smith's deed of June 4th, 1906, which vested the equitable title, and Werner's deed of August 15th, 1907, which vested the legal title in the Company as *"apparently"* executed on these respective dates. As to the Werner deed there

was neither averment nor evidence that it was *not* executed on August 15th, 1907, almost a year before the original bill was filed. As to the deed from Smith, the amended bill averred that it "was not executed at the date which it bears on its face, but was executed by said C. A. Smith and Johanna A. Smith, his wife, long after the commencement of this suit and shortly prior to the time the same was offered for record" (68), and in support of this charge three witnesses were called, who saw the deed when it was filed for record on September 9th, 1908. All disclaimed expert knowledge, but testified that the deed at that time "looked very recent," "very fresh" (Cowgill, 854, 859); "presented a strikingly fresh appearance, * * * appeared to be quite fresh" (Curl, 881), "had a rather fresh look, the signature of the grantor, * * * looked as though it had been freshly written * * * I should say something like five or six months—something like that" (Froman, '90-1). How much this evidence was worth was shown on cross-examination when Cowgill gave the opinion that the signature to the amended bill, filed November 16th, 1908, was older than the signature to the original bill, filed May 25th, 1908 (869), and that the district attorney's signature to the amendment of the bill was six months old (847) when in fact it was six days old. He testified April 27th and the amendment was dated April 21st (126-7). Curl's cross-examination (883-7) and Froman's cross-examination (890-92) show their opinions to be no better. On the other hand, that the deed

from Smith (U. S. Exhibit 155, Record 925-37) as well as the other two deeds which he gave to the Company for its capital stock (Defendant's Exhibits C and D, Record 1384-91) were actually executed June 4th, and delivered June 9th, 1906, was shown by the positive testimony of Smith (1334), the positive testimony of the subscribing witnesses Ethel Steele (1250-54) and Trabert (1270-73), the positive testimony of Lind (1327-33) and the contemporaneous record of the Company (967-9). As to the statement that "one at least of the purposes for which it (the Company) was formed was to fraudulently conceal therein the title to the lands," attention is again called to the facts that legal title to the 4,480 acres involved was placed in Werner December 21st, 1904 (65), and almost immediately thereafter Smith procured a loan of $40,000 on the land on the security of a mortgage from Werner to Amsden, assigned by the latter to the First Trust and Savings Bank of Illinois (69, 110, 1337); that in January, 1905, the Government, according to the bill, "was conducting a vigorous investigation of charges of violation of the public land laws in Portland, Oregon, when a large number of said entrymen and entrywomen, together with the defendants, Frederick A. Kribs and Stephen A. D. Puter and also other persons who had acted with them in the transactions * * * disclosed to complainant that the timber and stone land entries hereinbefore set forth and described were false and fraudulent" (135); that Smith knew of this investigation (690), but he left the title

of record in Werner and took no action towards organizing the Company until May, 1906; that he then organized several companies, each to take lands assembled in a locality so as to constitute a practical separate holding (1328), and that with this in view, he vested in the defendant company the 7,440 acres which he had in Douglas County, the 3,371 acres which he had in Lane and the 36,484 acres which he had in Linn aside from the 4,480 in controversy. That it was a mere incident that the 4,480 acres were included in the deed of the Linn County lands,—included only because they were interspersed with his other lands in that county—appears conclusively from the fact that nothing was done to put the *legal* title in the Company until August 15th, 1907, the title remaining meanwhile of record in Werner. Smith, moreover, cleared the lands from the $40,000 mortgage to the First Trust and Savings Bank (1337, 1360), and when he raised money on timber bonds in April, 1908, some six weeks before the original bill was filed, he did so on the security of other timber lands, leaving the lands involved in the suit unencumbered (1336).

Is it conceivable that if Smith organized the Company for the purpose of concealing in it the title to the lands in controversy he should have waited nearly a year and a half after this investigation of January, 1905, before he took steps to organize the Company, should have left the title of record in Werner during that period and an additional fifteen months, should have cleared the land from

the $40,000 incumbrance, should have mortgaged other lands to secure his bond issue, and should have conveyed to the Company some 38,000 acres, the title to which there was no motive for concealing from the Government?

The assessment and payment of taxes after the conveyance to the Company is specified as evidence of a fraudulent purpose on Smith's part in its organization. The court must refer to the minutes of the meeting of the board in January, 1907. The Company, as already shown, became owner of nearly 53,000 acres of land soon after its organization in exchange for its capital stock. For taxes to accrue it had to sell land or borrow money. Accordingly we find in the minutes referred to a record of an arrangement to borrow the money from Smith at interest. The minutes, as shown in the statement of the case, read:

"In view of the fact that the corporation had no funds, and did not desire to dispose of any of its lands, Mr. C. A. Smith proposed to advance the money needed to pay the taxes and other necessary expenses from time to time as required, all advances made by him to draw interest at six per cent per annum. This proposition was accepted by the board" (790).

This arrangement was certainly businesslike from every point of view, especially because of the interest in the Company thereafter acquired by others. If it has a tendency to show anything material to the case, it can only be a *bona fide* relation at that time between Smith and the Company with respect to the title to the lands on which taxes were

to be paid.

There is, therefore, really nothing upon which the Court of Appeals can base the statement quoted, except the fact that the two deeds to the Company were not recorded. This the court says is a badge of fraud and quotes 20 *Cyc.* 446. The cases there collected relate to conveyances in fraud of creditors. What they hold is that if a grantor withholds the conveyance from record for the purpose of giving the grantee a fictitious credit, and the obtaining of such credit is the result, it is a fraud on the creditor. They do not hold that the mere omission to record is a fraud. For a review of the cases we refer to the opinion of Vice-Chancellor Pitney in *Flemington Bank v. Jones*, 50 N. J. Eq. 244. We think there is a clear distinction between that class of cases and the case at bar. In those cases it is the omission to record which constitutes the fraud rendering the deed voidable. In the case at bar the omission to record had no connection with the fraud relied upon for vacating the patents. That fraud, if any there was, consisted in the filings, with which Smith had nothing to do. He was just beginning to purchase timber on the Coast and these lands were his first purchase (1339). He did not want to buy in his own name because of the effect it might have on prices, and, therefore, directed the title to be taken in the name of his brother (1024-51, 1377). This is a common practice when a large tract of land is sought to be acquired gradually in one locality. It is a fraud on nobody, and the real purchaser is none the less an

innocent one (*New Banking Co. v. Montgomery*, 95 U. S. 16). Smith, as we have seen, was an innocent purchaser unless he can be charged with constructive notice. The first he knew about the grantors being entrymen under the Timber and Stone Act was when he came to Albany, Oregon, on May 21st, 1900. Then he found the purchase money for every tract had been paid and that every deed had been delivered (710, 774, 1341, 1355, 1369, 1443). For the lands involved there had been paid to the Government about $12,200 and the consideration Smith had then paid was about $25,600, the then full value (559, 1020, 1346). The omission to record deeds executed six years later could not be a fraud unless recording was a duty that Smith or his grantee owed to the Government. No such duty rested on either, legally or morally.

C.

As to the proper construction of the statute.

The Bankruptcy Act of March 2nd, 1867 (14 St. L. 518), contained limitations for the bringing of suits, which, together with the judicial construction that these enactments received, have entered into the discussion as to the legislative intent of the Act of March 3rd, 1891, and should, therefore, be noted at the outset.

Section 2 of the Bankruptcy Act contained this provision:

"But no suit, at law or in equity, shall in any case be maintainable by or against such assignee

(in bankruptcy), or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee."

Section 34 provided:

"That any creditor or creditors of said bankrupt whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same."

The passages quoted are found with slight changes of language in Sections 5057 and 5120, Revised Statutes. They soon came before the Federal Courts for interpretation. As early as 1874, this court had occasion to hold in the case of *Bailey v. Glover*, 21 Wall. 342, that in an action by an assignee in bankruptcy to obtain redress for fraud, the suit should not be deemed to have accrued, so as to set the limitation contained in section 2 running, until the fraud was discovered, and in 1883 the same was again held in *Rosenthal v. Walker*, 111 U. S. 185. Section 34 was construed in *Pickett v. McGavick*, 14 N. B. R. 236, 19 Fed. Cas. No. 11, 126, in 1876; *In re Brown*, 19 N. B. R. 312, 4 Fed. Cas. No. 1983, in 1879, and in *Matter of Herzig*, 15 Abb. Pr. (N. S.) 179, in 1885. In each of these cases it was held, referring to *Bailey v. Glover*, that the limitation in section 34 could not be construed to run from the time the fraud

was discovered the same as that in section 2, the language in section 34 being explicit that the application had to be made within two years after the date of the bankrupt's discharge. Judge Parker said in *Pickett v. McGavick*:

"Under the ordinary statutes of limitations, which provide that suits shall be brought in a specified time after the cause of action accrued, it has become a fixed rule, that, where an action is based on fraud, the statute does not commence to run until the discovery of the fraud, or until it has become known to the party injured by the fraud, because it can well be said that a cause of action does not accrue until the party could avail himself of a remedy to enforce that cause of action, and he could not do so until the cause of action was discovered or became known to him. But this section is different from the ordinary statute of limitations * * *. It positively provides that the discharge may be contested at any time within two years after the date thereof, on the ground that it was fraudulently obtained."

Judge Choate cited the case with approval *In re Brown*, and said:

"It appears to me that the language used, 'two years after the date thereof,' is not capable of that enlargement by construction that has been found possible in statutes of limitation generally."

Judge Brown, in *Matter of Herzig*, said:

"Under this section (section 2) in cases of concealed fraud, it is held that the cause of action does not accrue until the discovery of the fraud or reasonable means of knowledge of it (*Bailey v. Glover*, 21 Wall. 342; *Rosenthal v. Walker*, 111 U. S. 185, 190). Section 5120, however, is so different in its language as not to admit of any enlargement by similar latitude of construction."

When Congress in 1891 took up the subject of limiting the time for attacking the validity of patents, it did so, first, by the adoption of section 8 of the Act, found in 26 St. L., page 1095, and next by the act amending that section, found on page 1903. The main act contained sweeping changes in our public land-laws. The timber-culture and pre-emption laws were repealed; the desert-land and homestead laws were amended, and provisions were made for the disposition of lands in Alaska for town-sites, trade and manufacturing purposes. The different land-laws so repealed or enacted provided for patents. The repeals and amendments were contained in the first seven sections. Then followed section 8 in this language:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

It should be noted that in the first seven sections, provisions were made for perfecting claims under the acts repealed, and that the validity of such claims under the pre-emption law depended upon an affidavit under Revised Statutes, section 2262, of substantially the same import as the affidavit required by section 2 of the Timber and Stone Act; also that section 5 amended section 2290 of the Revised Statutes so that a person thereafter making a homestead entry had to take an oath, that his application was "not for the benefit of any

other person, persons or corporation," or "in collusion with any person, corporation or syndicate to give them the benefit of the land entered," or "for speculation." The limitations in section 8 as to patents issued and to be issued, had thus an almost direct reference to patents voidable for fraud.

When the act was passed, there were outstanding thousands upon thousands of patents under the Timber and Stone and other acts, subject to attack for fraud. As to them, the act said that suit should *"only"* be brought within five years from its passage. No *other* limitation was fixed. As to that multitude of then existing patents, suits to vacate them on account of fraud became therefore barred on March 3rd, 1906, or have never since become barred, and never will be, unless another act is passed. The same is true of the vast number issued after the passage of the act. Suits to vacate them are *"only"* to be brought within six years after their dates. The act makes no *other* limitation. If the dates are not to determine the period of limitation for suits brought to set them aside for fraud, then there *is* no limitation to suits of that nature. As to either class of patents, the time of the discovery of the fraud is immaterial, for the Act does not pretend to create a period of limitation with reference to that time; and while the time of the discovery of the fraud might affect the standing of ordinary litigants by reason of laches, it could not so affect the Government.

On the supposed authority of *Bailey v. Glover* the Court of Appeals held that the statute did not

run against the suit from the dates of the patents, but from the time of the discovery of the fraud, saying:

"No distinction between the statute of limitations involved in that case (*Bailey v. Glover*) and that involved in the present case is to be found in the fact that in the former the time is limited from the date 'when the cause of action accrued'" (1457).

Thus the court held, in effect, that the words: "within five years from the passage of this act," and "within six years after the date of the issuance of such patents," mean within five or six years "after the cause of action accrued," or "after the discovery of the fraud."

It may serve no purpose to discuss the meaning of plain language, but it may be interesting to see how it was understood by Congress when the Act of March 2, 1906 (29 St. L. 42), was passed, extending the limitation as to a certain class of patents.

On December 18th, 1895, the Commissioner of the General Land Office addressed a letter to the Secretary of the Interior, stating that the department was engaged in recovering lands erroneously patented, but would be unable to complete the work within the time fixed by the Act of 1891 and he therefore suggested that the time should be extended. The Secretary thereupon addressed a letter to the President, who sent both letters to Congress with a message in which it was said by way of recommendation that,

"In these circumstances, it seems to me that the Act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants" (*Congressional Record*, Vol. 28, Part 2, pp. 1062-3).

Two bills were thereupon introduced—one for the entire repeal of the Act of 1891, the other for its amendment. The former was rejected; the latter was adopted upon the recommendation of the House Committee on Public Lands, in whose report the purpose of the Act to be amended was described as follows:

"In order that all these questions might be speedily adjusted, and that any proposed litigation for the purpose of annulling patent titles should be promptly brought, the limitation act of 1891 was passed, requiring that all such suits as to patents already issued should be commenced within five years, or prior to March 3, 1896, and that as to patents subsequently issued suits to cancel the same should be brought within six years after the date of the patent."

Then referring to the pending bill the report said:

"While it is important that the rights of the Government should be cared for, and that a reasonable time for adjustment of these grants should be given, it is also of the highest importance that the validity of the Government's patents should be examined as speedily as practicable so that former settlers and those who wish to become settlers or purchasers of these lands may know that the Government patents issued by the highest authority of that nation shall be evidence of a final and complete character that the Government's title has been lawfully transferred.

* * * * * * *

"The limitation may perfect titles in some instances founded in more or less *of fraud or mistake.* So it happens with all such statutes, but universal experience has demonstrated the necessity of such statutes" (*Congressional Record,* Vol. 28, Part 2, p. 1761).

This report and the debate on the bill show that the general view in Congress was that all fraudulent patents became "evidence of a final and complete character that the Government's title had been lawfully transferred" if suits to vacate them were not commenced within the specified time. And it is perhaps worth noting that in the Act adopted by way of amendment the language of the old Act was repeated:

"That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the Second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to" (29 St. L. 42).

Within a year after the adoption of this amendment this court in *United States v. Winona, etc., Railroad Co.,* 165 U. S. 463, considered with care the intent, purpose and policy of Congress in passing the original act and the amendment, and expressed its views as follows, speaking by Mr. Justice Brewer:

"In the first place, it (Congress) has distinctly recognized the fact that when there are no adverse individual rights, and only the claims of the Government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should, after the lapse of a prescribed time, be conclusive against the Government, and this notwithstanding any errors, irregularities or improper action of its officers therein.

"Thus, in the act of 1891, it provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued such suits should only be brought within six years after the date of issue. Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the land department. The act of 1896 extended the time for the bringing of suits for patents theretofore issued for five years from the passage of that act. It is true that these appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent by providing that after a certain time the Government, the grantor therein, should not be heard to question them."

The Act came again before this court in *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447. Patent had been issued to two islands in the Sault Ste. Marie, which the Government brought suit to annul as cloud on its title, claiming that it was void, the land having been reserved for public purposes. The defendant invoked the Act of 1891. The court, again, considered the intent and purpose of the Act and held that, although it was in form a statute of limitation, it was in reality a confirmation by Congress of patents which had been permitted to stand unquestioned for the specified time. Says the court, speaking by Mr. Justice Holmes:

"There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of opinion that now the patent must be assumed to be good. The statute just referred to provides that 'suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act,' that is to say, from March 3, 1891. This land, whether reserved or not, was public land of the United States and in kind open to sale and conveyance through the Land Department. *United States v. Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476. The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was

no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'Any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. *Leffingwell v. Warren*, 2 Black. 599.

"In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to effect the right, even if in terms only directed against the remedy. *Leffingwell v. Warren*, 2 Black. 599, 605; *Sharon v. Tucker*, 144 U. S. 533; *Davis v. Mills*, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See *United States v. Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476."

We think the foregoing must suffice to show the error of the Court of Appeals in holding that the Act of 1891 does not commence to run from the date of the patents, but from the time when the fraud affecting their validity is discovered by the Government. But the decision has been followed by the Circuit Court of Appeals for the Eighth Circuit in the case of *United States v. Exploration Company*, 203 Fed. 387, and as that decision will doubtless be cited for the appellee, we call attention to it here.

The bill in that case charged that the Exploration Company was a British corporation not qualified to acquire or hold coal lands, and that to defraud the Government it had procured patents to "dummy" entrymen and had concealed this fraud

until six years after the date of the patents by various affirmative acts of fraud, such as falsifying the dates of the deeds from the entrymen, having conveyances made to secret trustees, and withholding from record and from the knowledge of the Government several *mesne* conveyances, which, if known, would have disclosed the true facts in the premises. The court held the bill good on demurrer, reversing the lower court. It is not clear, however, whether it was intended to hold that when fraud is involved the statute does not begin to run until it is discovered, or only that such is the case when the party who had perpetrated the fraud keeps it concealed by affirmative fraudulent acts. We contend that both propositions are unsound as applied to the Act of 1891. The conclusions in that case and in the case at bar we think must have been reached by applying decisions of unquestioned authority in the construction of other statutes of limitations, but wholly inapplicable to the Act in question. This we will endeavor to point out as briefly as possible.

Taking some of the cases referred to directly or indirectly—the cases which we anticipate will be cited by counsel for the appellee—we find that the earliest involve Statute 21 James 1, Chap. 16, found in 2 *Wood on Limitations*, 631. Section 3 of that statute provided that certain specified actions at law "shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say * * * within six years next after the cause of such actions or suit

The report (by Mr. Lacey) was read, as follows:

"On the 17th day of January, 1896, the President sent to Congress a message in relation to the expiration of the limitation provided in the act of March 3, 1891. Under the act of March 3, 1887 (24 Stat. L., 556), the Interior Department was directed to adjust all the various railway and other land grants as speedily as practicable, and whenever it was ascertained that lands had been erroneously patented the law provided that actions should be brought to cancel the same.

"Provisions are embraced in the act of 1887 to protect settlers and purchasers by giving them preferential rights in case of the cancellation of their patents.

"These proceedings of necessity caused much disturbance among land titles, and although the purpose involved was the laudable one of protecting the Government by correcting mistakes and overturning fraudulent patents, a sense of insecurity and loss of confidence in the integrity of patent titles became a serious drawback to the settlement and improvement of some parts of the country.

"In order that all these questions might be speedily adjusted, and that any proposed litigation for the purpose of annulling patent titles should be promptly brought, the limitation act of 1891 was passed, requiring that all such suits as to patents already issued should be commenced within five years or prior to March 3, 1896, and that as to patents subsequently issued suits to cancel the same should be brought within six years after the date of the patent.

"The Commissioner of the Land Office on the 18th of December, 1895, addressed a communication to the Secretary of the Interior, suggesting an exten-

sion of time by an amendment to the act of 1891. The Secretary of the Interior communicated with the President upon the subject, recommending the repeal of the limitation altogether. Thereupon the President sent a message on the subject to Congress, asking for a repeal of section 8 of the act of March 3, 1891.

" We will set out in an appendix to this report the message and other communications above referred to.

" The Committee on the Public Lands have patiently examined the whole subject and invited before them all persons interested in the question, as also the Assistant Attorney-General for the Department of the Interior and the Commissioner of the General Land Office.

" There has been a large variety of land grants which will be affected by the proposed extension of the limitation. The Commissioner of the General Land Office was of the opinion that it would require ten years more to adjust the grant under the act of 1887, and therefore thought the limitation should be extended to ten years.

" In the adjustment of these grants it is not practicable for more than from two to four clerks in the General Land Office to work at one time without having duplicates made of certain lists or records. With this small force the adjustment has slowly proceeded for the last nine years, and over 60,000,000 acres still remain unadjusted. It appears, however, that by active diligence about 12,000,000 acres have been adjusted in the last year. At this rate the work could be completed in five years more.

" But even if it could not be done with the present force, the committee are of the opinion that duplicate copies of lists and documents or records ought to be

made to expedite this work, and that the time ought not to be extended more than five years.

"While it is important that the rights of the Government should be cared for, and that a reasonable time for adjustment of these patented grants should be given, it is also of the highest importance that the validity of the Government patents should be examined as speedily as practicable so that former settlers and those who wish to become settlers or purchasers of these lands may know that the Government patent issued by the highest authority of the nation shall be evidence of a final and complete character that the Government's title has been lawfully transferred.

"Under existing law, and in the absence of any limitation, a settler may buy a home upon one of these grants, and after occupying it for years, under the faith of a patent regularly issued and recorded, find himself made a party to a long, vexatious, and expensive litigation, and in the end be permitted to buy the land again from the Government or to enter it under the homestead laws.

"That such a thing may occur for a reasonable time is perhaps the necessary consequence of fraud and mistake in patents, but that such a condition should be kept open without limit is an intolerable blemish upon the titles purporting to come from the Government. If a private individual sells and conveys lands, and they pass into innocent hands, the purchaser is protected as against his grantor, and time will protect him against all comers. But as against the United States, in the absence of a limitation law, he is never secure and may be subjected to annoyance and expense and possible loss of his land at any time.

"A private individual may have obtained a patent for a homestead, tree claim, or pre-emption claim, and after selling the same the purchaser, who has bought upon the faith of the Government patent, may be harassed by proceedings in the courts hundreds of miles away, with a possible appeal to the expensive forms of the court of appeals, and the still more expensive and clogged tribunal of the United States Supreme Court.

"To remedy these defects the act of 1891 was enacted. On account of the large land grants involved, and the fact that it has not found it practicable to adjust them within so short a time, we think that a bill giving five years' longer limitation ought to pass, but we do not believe that this extension of time ought to affect *bona fide* purchasers; that as to them the limitation of the act of 1891 ought to operate as a final bar when the time first limited shall expire.

"But as to the original patentees, no great injustice will be done to them by extending the time five years longer, and within that time we think that the grants can be all adjusted. The shortness of this time, it is true, may put the Interior Department to some inconvenience, and it may involve some extra expense for clerical work, but the importance of bringing to an end all disputes upon the part of the Government as against its own patent titles is so evident as to need but little argument in its support.

"Your committee have prepared and presented a bill which will carry out the purposes outlined in this report, and we recommend its passage.

"We can not agree with the President that public policy requires that there should be no limitation as against the Government in these cases.

"We have had unpleasant object lessons in many of the Spanish grants, whose limits are as elastic and uncertain as the Venezuelan boundry. The presence of these disputed titles has cast a blight over some of our most beautiful lands for more than a generation. There should be some time fixed when such a condition shall cease to exist.

"The limitation may perfect titles in some instances founded in more or less of fraud or mistake. So it happens with all such statutes, but universal experience has demonstrated the necessity of such statutes.

"Most of the States of the Union have adopted statutes which will bind the States themselves. Such statutes have been found to work well. To require the sovereign power to proceed in a reasonable time if it wishes to avoid or nullify its own acts is a just provision in behalf of its individual citizens. The absence of limitation excuses delays on the part of officials, and that which may be done at any time, however distant in the future, is much less likely to be attended to in the present.

"We are informed that as to some of these land grants the greater part that has been patented has been sold to third persons. That was the very purpose of the land grants. It was not intended that these grants in aid of public improvements should be tied up indefinitely and withheld from settlement.

"It was the theory of the projectors of such enterprises that these lands would be brought into markets by the building of railways and that the railway companies would be interested in selling them on long time at low prices and at low rates of interest to actual settlers who would furnish a carrying business for the

new lines. It ought not to be the policy of the Government to harass or annoy one of these settlers by any litigation whatever.

"The policy of making railway grants has been long since abandoned. The adjustment of those made should proceed with all reasonable speed, so that the transactions may be closed.

"The railway companies themselves have encouraged delay by failing to procure their patents, in order to avoid local taxation. One of the purposes of the act of 1891 was to encourage the patenting of such lands, so that they might become subject to such taxation, and that their sale and settlement might be encouraged.

"The bill which the committee presents with this report is as follows:

"'*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a special grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within ten years after the date of the issuance of such patents. But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed.

"'SEC. 2. That if any person claiming to be a *bona fide* purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a *bona fide* purchaser, the Secretary of the In-

terior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons, for whose benefit the certification was made, for the value of said land, which in no case shall be less than minimum Government price thereof, nor more than the amount paid by the purchaser to the original grantee of the United States, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the *bona fides* of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a *bona fide* purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a *bona fide* purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States for the value of the land as hereinbefore provided. Any *bona fide* purchaser of lands patented or certified to a railroad company, and who is not made a party of such suit (and who has not submitted his claim to the Secretary of the Interior), may establish his right as such *bona fide* purchaser in any United States Court having jurisdiction of the subject-matter, or at his option as described in sections 3 and 4 of chapter 376 of the acts of the second session of the Forty-ninth Congress.

"'SEC. 3. If at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified, a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations,

is a *bona fide* purchaser, or are *bona fide* purchasers of any patented or certified land, by deed, or contract, or otherwise from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until [1762] such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a *bona fide* purchaser as aforesaid, or that such persons or corporations are such *bona fide* purchasers, then no such suit shall be instituted, and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons, for whose benefit the patent was issued or certification was made, for the value of the land as hereinbefore specified.'

VIEWS OF THE MINORITY.

"The undersigned, members of the Committee on the Public Lands, think that the Government should not be prevented from initiating proceedings to correct the fraud or errors of its agents or grantees, by which much of the public domain may be passed to corporations and syndicates. We propose the following substitute for the bill reported by the committee.

THOS. C. MCRAE.
O. W. UNDERWOOD.

"A bill to repeal section 8 of an act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March 3, 1891.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 8 of an act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March 3, 1891; the act entitled 'An act to amend section 8 of an act approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891,' and the act entitled 'An act to extend the provisions of section 8 of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891, concerning prosecutions for cutting timber on public lands, to Wyoming, New Mexico and Arizona,' approved February 13, 1893, be, and the same are hereby repealed."

APPENDIX.

"We here set out the President's message and the departmental correspondence upon which it was based:

[House Document No. 151, Fifty-fourth Congress, First session.]

MESSAGE OF THE PRESIDENT OF THE UNITED STATES.

To the Congress:

"I desire to invite attention to the necessity for prompt legislation in order to remove the limitation of the time within which suits may be brought by the Government to annul unlawful or unauthorized grants of public lands.

"By the act of March 3, 1887 (24 Stats., 556), the Secretary of the Interior is directed to adjust each of the railroad land grants which may be unadjusted, and it is provided, if it shall appear, upon the completion of such adjustment or sooner, that the lands have been from any cause erroneously certified or patented by the United States to or for the use of a company claiming under any of said grants, it shall be the duty of the Secretary of the Interior to demand a reconveyance of the title to all lands so erroneously certified or patented, and on failure of the company to make such reconveyance within ninety days the Attorney-General is required to institute and prosecute in the proper courts necessary proceedings to restore title to said lands to the United States. The demands made under this act have been numerous, and in some cases have resulted in the reinvestment of title to the lands in the United States upon demand, but in most cases the demand has been refused and suits have been necessary.

"The work of adjustment has been unavoidably slow. The said act makes provision for the reinstatement of entries erroneously canceled on account of railroad withdrawals, and upon certain conditions, provides for the confirmation of titles derived by purchase from the companies of lands shown to be excepted from the grants. It contemplates a disposition of every tract described by the granting act, situated within the primary or granted limits; an inspection of each tract certified or patented to the company within such limit, to determine whether such certification or patenting was proper; the listing of those tracts shown to be erroneously certified, and the determination for what tracts lost to the grant indemnity is to be allowed.

"It is necessary, in making such an adjustment, that all questions of conflicting claims, either between settlers and the road or between two roads, the grants for which conflict or overlap, be finally disposed of, so that a proper disposition of the land can be shown in the adjustment. While adjustments have proceeded with the utmost rapidity consistent with a due regard for the rights of the settlers of the United States, and the railroad companies, and while to this end the force of adjusters has been largely augmented in the General Land Office, many of the grants yet remain unadjusted.

"In some of the grants, notably the corporation grants, the lack of surveys up to the present time made the completion of the work impossible.

"Decisions rendered by the Interior Department in numerous conflicts have been carried into the courts. The construction of the Interior Department has generally been sustained when final determination has been reached, but many of the cases are still pending in the courts, not yet having been decided. Some of these cases, while involving immediately the title to only one particular tract, will, when decided, furnish a rule of construction to control the disposition of the title to thousands of acres of other lands in the same situation. Until the courts pass upon these questions final adjustments can not be made.

"By section 8 of the act of March 3, 1891 (26 Stats., 1099), it is expressly enacted that suits by the United States to vacate and annul any patent theretofore issued 'shall only be brought within five years from the passage of this act.' This period of five years will expire on the 3d of March, 1896. Of course no suit by the United States to secure the

cancellation of a patent in this class of cases after that date would be effective. Indeed, it is now too late to initiate proceedings looking to any such suit, inasmuch as demand has to be first made on the company, and thereafter ninety days must be allowed for compliance or refusal, in accordance with the provisions of the act of March 3, 1887. Before the expiration of this period the statute would bar the right of recovery by the Government, and the benefits of anticipated favorable decisions of the courts would be lost so far as they might determine the character and disposition of grants similar to those directly involved in pending cases.

"It will be readily seen that if this act of limitations is to remain on the statute books the portion of the adjustment act referred to would be rendered nugatory. Indeed, there would be but little use in continuing the adjustment of many of the land grants, inasmuch as ascertained rights of the United States or of settlers could not be enforced by law.

"Legislation establishing limitations against the right of the Government to sue is an innovation not entirely consistent with the general history of the rights of the Government, for it has uniformly been held that time did not bar the sovereign power from the assertion of a right.

"The early adjudications of the Land Department construed the grants with a degree of liberality toward the grantees which later decisions of the courts and of the Department have not sustained. It seems clear that the further progress of adjustments will develop facts and transactions in connection with these land grants which ought to be the subjects of legal examination and scrutiny before they are allowed to be-

come final and conclusive. The Government should not be prevented from going into the courts to right wrongs perpetrated by its agents or any other parties, and by which much of the public domain may be diverted from the people at large to corporate uses.

"In these circumstances, it seems to me that the act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants. And I respectfully urge upon Congress speedy action to the end suggested, so that the adjustment of these grants may proceed without the interposition of a bar, through lapse of time, against the right of recovery by the Government in proper cases.

"GROVER CLEVELAND.

"Executive Mansion, January 17, 1896.

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, December 27, 1895.

"SIR: I beg leave to invite your attention to the provisions of section 8 of the act of March 3, 1891 (26 Stat. L., 1099), where it is enacted that suits by the United States to vacate and annul any patents theretofore issued 'shall only be brought within five years from the passage of this act,' which, in my opinion and that of the Commissioner of the General Land Office, ought to be repealed. In order that you may fully understand the situation, I beg to submit the following observations:

"By the Act of March 3, 1887 (24 Stat. L., 556), the Secretary of the Interior is directed to adjust each of the railroad land grants which may be unadjusted; and it is provided if it shall appear, upon the comple-

tion of such adjustment, or sooner, that lands have been from any cause erroneously certified or patented by the United States to or for the use of a company claiming under any of said grants, it shall be the duty of the Secretary of the Interior to demand a reconveyance of the title to all lands so erroneously certified or patented; and on failure of the company to make such reconveyance within ninety days the Attorney-General is required to institute and prosecute, in the proper courts, necessary proceedings to restore title to said lands to the United States.

"The said act also makes provision for the reinstatement of entries erroneously canceled on account of railroad withdrawals, and, upon certain conditions, for the confirmation of titles derived by purchase of the companies of lands shown to be excepted from the grants.

"The demands made under this act have been numerous, and in some cases have resulted in the reinvestment of title to the land in the United States; but in most cases the demand has been refused or no response made thereto, and suits have been necessary.

"The work of adjustment contemplates a disposition of every tract described by the granting act situated within the primary or granting limits; an inspection of each tract certified or patented to the company within such limit, to determine whether such certification or patenting was proper; the listing of those tracts shown to be erroneously certified, and the determination for what tracts lost to the grant indemnity is allowable.

"It is necessary, in making such an adjustment, that all questions of conflicting claims, either between set-

tlers and the roads or between two roads the grants for which conflict or overlap, be finally disposed of so that a proper disposition of the land can be shown in the adjustment.

"In some of the grants, notably the corporation grants, the lack of surveys renders an immediate adjustment impossible.

"Decisions have been made by this Department in the matter of numerous conflicts and the cases have been carried into the courts.

"So far as the same have reached final determination they have generally been favorable to the construction of this Department, but many are still pending in the courts.

"Under the provisions of the act of March 3, 1887 *(supra)*, the adjustment of the railroad land grants has proceeded with the utmost rapidity consistent with a due regard for the rights of the settlers of the United States and the railroad companies. To this end the force of adjusters has been largely augmented in the General Land Office; and when deemed advantageous, the hours of work have been prolonged even until late at night. And when any such adjustment has been submitted to the Secretary for consideration and approval, as is required in every instance, prompt action has always been taken, such work being treated as 'special.'

"Notwithstanding these extraordinary efforts, many of the grants yet remain unadjusted, though much and very rapid progress has been made. But from the nature of the many difficulties and complications connected with the work, the recital of which would occupy too much space herein, it has been, and is, both a moral and physical impossibility to close the adjust-

ment of these grants as speedily as desired. Some of the cases now pending in the courts involve actually the title to only one particular tract, while a decision upon the questions therein would control the disposition of the title to thousands of acres of other lands in the same category.

"When these important matters will be decided it is almost impossible to say, but certainly not before March 3, 1896. Should these questions be decided favorable to the Government, the favorable decision could not necessarily be made to inure to its benefit as to the other lands the title to which was not by actual description embraced in said decision, because, by section 8 of the act of March 3, 1891 (26 Stat. L., 1099), it is expressly enacted that suits by the United States to vacate and annul any patent theretofore issued 'shall only be brought within five years from the passage of this act.' This period of five years will expire on the 3d of March, 1896.

"Of course, no suit by the United States to secure the cancellation of a patent in this class of cases after that date would amount to anything. Indeed, it is now too late to initiate proceedings looking to any such suit, inasmuch as demand has to be first made on the company, and thereafter ninety days must be allowed for compliance or refusal in accordance with the provisions of the act of March 3, 1887 (*supra*), before the expiration of which time the statute would bar the right of recovery by the Government.

"Recent decisions of the Supreme Court have greatly affected the previous dispositions made under railroad grants, but will facilitate the progress of the readjustment of grants, notably, Barden vs. Northern Pacific Railroad Company (154 U. S., 288);

Bardon vs. Northern Pacific Railroad Company (145 U. S., 535); Whitney vs. Taylor (158 U. S., 85), and United States vs. St. Paul and Sioux City Railroad (159 U. S., 349).

"It will be readily seen that if this act of limitations is to remain on the statute books the portion of the adjacent act of 1887, before cited, would be rendered nugatory. Indeed, there would be but little use in continuing the adjustment of many of the land grants, inasmuch as ascertained rights of the United States or of settlers could not be enforced by power of law. By this denial to the Government of the right to go into court and ascertain its rights the railroad companies would profit very largely, as it is a well-known fact, capable of abundant substantiation by the records of the Land Office, that the early adjudications of the Land Department construed the grants with a decree of liberality toward the grantees which, by later decisions, is declared not to have been warranted by law.

"Should, therefore, the statute of limitations make them secure in the enjoyment of the lands thus obtained, it is entirely inconsistent with experience to suppose for a moment they would, on an impotent demand, voluntarily surrender anything that the law secures them the enjoyment of.

"It is submitted, with due respect, that the legislation of Congress establishing this limitation against the Government is an innovation utterly inconsistent [1763] in my opinion with the theory of our institutions, and seems likely to result almost entirely in benefiting the interests of the corporations and adversely to those of the Government. From time immemorial it has been held that limitations did not bar

the sovereign power from the assertion of a right. And in this country the highest judicial tribunals have uniformly held that laches was not to be imputed to the Government, which could only act through its agents. But in this matter the Government is barred from righting the wrongs, whether intentional or inadvertent, perpetrated by those agents against the people at large, by which much of the public property has been perverted to corporate uses.

" Statutes of limitations are regarded favorably because of the repose they give against stale claims, the presumption being that after the lapse of a reasonable time they have been asserted and adjusted or waived.

" But this presumption does not arise where, from circumstances, no proper opportunity has been afforded for the assertion of the claims, as, for instance, during the existence of the disabilities of minority, coverture, or the like. And certainly such presumption can not arise in the matter of these land grants, where, as is abundantly shown, from the very nature of the case, the rights of the Government are ascertainable with so much difficulty.

" Under these circumstances it seems to me that the act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants. And I respectfully request that you urge upon Congress to take speedy action, as suggested, that there may be no delay in the adjustment of these grants and no bar, by lapse of time, against the right of recovery by the Government in a proper case.

" Herewith is transmitted copy of the letter of the Commissioner of the General Land Office to me on

this subject. Your attention is invited to the fact that in recommending the repeal of the existing law he suggests the reenactment of limitations of ten years within which suits are to be brought to secure cancellation of patents. I do not entirely concur in this suggestion of the Commissioner, but think, for reasons herein stated, it would be best to repeal the limitations absolutely, and leave the law as it existed prior to the passage of said act of March 3, 1891.

"Very respectfully,

HOKE SMITH,

Secretary.

"THE PRESIDENT.

"DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,

"*Washington, D. C., December 18, 1895.*

"SIR: On March 3, 1891, an act of Congress entitled 'An act to repeal the timber-culture laws, and for other purposes,' was approved by the President (26 Stat., 1095). Section 8 of said act provided, among other things, 'that suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issue of such patents.' And by another act, approved the same day (26 Stat. L., 1093), entitled 'An act to amend section 8 of an act approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes,"' the same proviso was enacted. It will be observed that this section makes no exception, but applies to all patents.

"By act of March 3, 1887 (24 Stat. L., 556),

directions were given for the adjustment of all grants by Congress to aid in the construction of railroads, and for the recovery by the United States of title to lands which from any cause have been erroneously certified or patented under such grants, and said act requires that the adjustments be made in accordance with the rulings of the United States Supreme Court. Therefore, as conveyances under these grants date as far back as 1850 and were made under various court and departmental rulings, it is not surprising that many of said conveyances have been and will be found, under the construction now given such grants by the Supreme Court, to have been erroneous.

"A number of these grants have been examined with a view to their adjustment, and rules have been laid to show cause why suits should not be instituted for recovery of title in some cases, and demands for reconveyance have been made in others, but very few have been finally adjusted and closed, not more than a dozen; and most of these examinations, nearly all in fact, were made prior to the rulings of the United States Supreme Court in the cases of Mary Bardon vs. Northern Pacific Railroad (145 U. S., 535), and Whitney vs. Taylor (158 U. S., 85), which so change the previous rulings of the court, as construed by this Department, as to make necessary a re-examination of all railroad land grants, excepting the few finally closed and some half dozen examined since the decision in the case of Whitney vs. Taylor, above referred to. The Department so held in its letters of July 18, 1895, in the case of the St. Louis, Iron Mountain and Southern Railway Company, and Sep-

tember 5, 1895, in the case of the Burlington and Missouri River Railroad Company of Iowa.

"There are 79 land-grant railroads and 7 land-grant wagon roads.

"Under the provisions of section 8 of the act of March 3, 1891, as originally passed and amended as aforesaid, the time within which the United States can legally bring suit for the recovery of lands erroneously patented prior to March 3, 1891, will expire March 3, 1896, unless an extension be made by Congress.

"The work of adjusting these grants is one of great magnitude, and the division of the office charged with its execution is also charged with the consideration and determination of all questions relating to or arising out of conflicts between grants by Congress to aid in the construction of railroads, wagon roads, canals, and river improvements and rights of way over the public lands for railroads, canals, ditches, and reservoirs, and its current work must be kept up. It is also charged with the administration of the grant of desert lands to certain States.

"It is clear, therefore, that the time within which the United States may bring suit for recovery of land erroneously certified or patented under these grants must be extended or that the interests of the Government, and in many instances those of private citizens, must suffer. I have accordingly the honor to suggest that Congress be asked to extend such time ten years, or until March, 3, 1906, for lands patented prior to March 3, 1891, and ten years from date of patent for lands patented subsequent thereto.

"Very respectfully,

"S. W. LAMOREUX, *Commissioner.*

"THE SECRETARY OF THE INTERIOR."

THE SPEAKER: The question is on agreeing to the amendments recommended by the committee.

MR. LOUD: Mr. Speaker, I make the point of order that this is not a privileged matter. I would like to hear from the gentleman from Iowa on that point.

MR. LACEY: It is undoubtedly a privileged report from the Committee on Public Lands under paragraph 57 of Rule XI, which provides that the Committee on Public Lands shall have the privilege of reporting at any time "bills for the forfeiture of land grants in the public lands, and bills for the reservation of the public lands for the benefit of actual and *bona fide* settlers."

Now, Mr. Speaker, this bill is a bill for the reservation of the public lands for actual and *bona fide* settlers, lands that have been erroneously patented to somebody else. It provides means by which that erroneous patenting may be recalled and the lands may be reserved for the benefit of *bona fide* settlers, and it comes clearly within the paragraph of the rule I have cited.

MR. LOUD: I submit, Mr. Speaker, that this bill merely extends the time in which suits may be begun, and there is a question in my mind as to whether it does come within the provision of the rule. This is a bill which I am rather inclined to think will provoke a good deal of discussion on this floor, and the question I now raise is whether it comes within the rule as privileged. It is a bill which merely extends the time within which suits may be begun.

MR. LACEY: I will say to the gentleman that it is a matter of great importance to his State.

MR. LOUD: It is of great importance to my State. It opens up one of the greatest questions in California;

it opens up all the old Mexican titles which we have heretofore regarded as settled. I doubt very much whether it is a privileged matter.

MR. LACEY: It does not open up that question, Mr. Speaker; the question is now open. This bill merely amends a limitation law which is now in force, the act of 1890, and is in response to the message of the President sent here on the 17th of last month. The limitation expires on the 3d day of next month, and if there is any question about the bill being privileged there certainly should be no question about its consideration at the earliest practicable time.

MR. LOUD: I will not object to its consideration. The question I raise is as to whether it is privileged.

MR. PICKLER: Oh, well; let it go.

THE SPEAKER: If the point of order is insisted upon, the Chair would like to understand how the bill does come within the provisions of the rule.

MR. LACEY: In this way. The land grants have to be adjusted under the act of 1887. That act required that the Secretary of the Interior should, as speedily as possible, adjust all of these land grants and determine the lands, if any, which had been patented erroneously, such as lands lying beyond the limits of the grants. Then the act of 1891 was passed, limiting actions to cancel such patents to five years, and this bill now proposes to extend that time five years more as to everybody except *bona fide* settlers, so that the lands which will be affected will be lands that will be reclaimed by the United States to be reserved for the benefit of the public.

This bill, therefore, reserves for public settlement erroneously patented lands, and that brings it within the privilege of the rule. If it does not, of course the

bill is not privileged. It opens the lands also to settlement, which brings it within the privilege.

MR. LOUD : I admit that that may be contingent ; but the object is simply to extend the time within which certain suits may be begun, which makes the mass of titles, which are now substantially perfected, for the next five years or more still under supervision by the Government and subject to question.

THE SPEAKER : The Chair thinks that that provision has always had a liberal construction, and will decide that it is a privileged matter.

MR. LOUD : Then I raise the further point of order that this must have its further consideration in the Committee of the Whole.

MR. LACEY : It does not involve the expenditure of any public money.

MR. LOUD : It relates to the public lands generally, however.

MR. LACEY : It does not involve the giving away of the public lands, but the reclaiming of public lands wrongfully patented, and I do not think it is subject to that point.

THE SPEAKER : On what ground does the gentleman from California claim that this must go to the Committee of the Whole.

MR. LOUD : Because it provides ultimately for the disposition of the public lands.

THE SPEAKER : In what way.

MR. LOUD : Well, it takes land now in possession of certain parties back to the Government, which is an ultimate disposition of the lands.

THE SPEAKER : But that seems to be not an appropriation of money, but an acquisition of money.

MR. LOUD : I am not speaking of the money por-

tion, but that it is ultimately a disposition of the public lands, which I assume involves a question that must be considered in Committee of the Whole.

MR. BOWERS: If I may be allowed a minute, as one of the committee—

THE SPEAKER: Before the gentleman proceeds the Chair will overrule the point of order.

MR. BOWERS: Then I have nothing further to say on the subject at this time.

MR. MCRAE: Now, Mr. Speaker, I desire to offer a substitute for the bill. [1764]

MR. LACEY: I yield to the gentleman from Arkansas to offer a substitute for the bill, so that both may be considered together.

MR. MCRAE: I offer the following as a substitute:

The Clerk read as follows:

"A bill to repeal section 8 of an act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March 3, 1891.

"*Be it enacted, etc.*, That section 8 of an act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March 3, 1891; the act entitled 'An act to amend section 8 of an act approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891,' and the act entitled 'An act to extend the provisions of section 8 of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891, concerning prosecutions for cutting timber on public lands, to Wyoming, New Mexico and Arizona,' approved February 13, 1893, be and the same are hereby repealed."

MR. LACEY: Mr. Speaker, the proposed substitute offered by the gentleman from Arkansas sounds very

complex to hear it read, but is in fact a very simple matter. The act of 1891, March 3, providing a limitation against the Government in bringing suit to cancel the patents to public lands previously granted to anybody, required that all such suits should be begun within five years. This proposed substitute repeals that section without any limitation whatever, but continues the power on the part of the Government hereafter at any time to bring actions to cancel patents either to railroad companies or others for any lands that have been granted heretofore.

The committee bill, however, has been prepared with great care in response to the message of the President read to this House on the 17th day of last January. The President calls the attention of Congress to the fact that that limitation in the act of 1891 will expire on the 3d day of March, 1896, and that there are 60,000,000 acres of land grants yet to be adjusted in order to determine what patents, if any, had been erroneously issued, and asks that the law may be repealed that fixed this limitation.

The Committee on the Public Lands of the House, in response to the request of the President, prepared the bill now before the House extending the time as to these Mexican, Spanish, and railroad land grants for a period of five years. We fixed upon that time for this reason: Last year the entire force of the division of the Interior Department engaged in this work succeeded in adjusting land grants to the extent of 12,000,000 acres. There are about 60,000,000 acres of land grants yet unadjusted. The committee believe that in five years, with the same diligence shown by the Department during the last year, they could adjust all of the remaining grants.

If we gave them ten years to do the work in, instead of five, the committee believe it is likely that nothing will be immediately done; but if the time was limited to five years, active work will be done, and I think that the work will all be complete within that time.

The previous adjustments of these grants have only been carried through the Department at the rate of about 3,000,000 acres a year until during the last year, when by active, diligent work, the Department succeeded in adjusting 12,000,000 acres. This bill, therefore, in the judgment of the committee, gives ample time for the conclusion of the work.

As to the settlers now on the lands, we report that the individual settlers or purchasers who have bought land from the railroad companies and other parties, and who are innocent holders of land, should not be disturbed, and that the limitation of the act of 1891 shall be absolute after the 3d day of March next.

There are in California, in Kansas, in Nebraska, and in other States very considerable quantities of these lands which have passed into the hands of innocent holders, and they are protected by the bill in its present form. I now yield ten minutes to the gentleman from Arkansas [Mr. McRae].

MR. HARTMAN: Before the gentleman does that, I want to ask him a question. I am interested in this bill, as he is, and I favor the bill. There is only one thing about it that I want to ask his judgment upon. Commencing in line 12 of page 1, and ending on line 15, page 2, the following language occurs in the bill:

"But no patent to any lands held by a *bona fide*

purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

Now, in many instances purchasers of these lands have bought them prior to the issuance of the patent by the Government to the railroad company. I want to know whether their rights will in any way be affected by the provisions of this bill? To illustrate my point, I will say that there are now in the neighborhood of 2,000 men in the State that I represent here who are *bona fide* purchasers of Northern Pacific Railroad lands. They have taken them in good faith, made a partial payment, bought them on the five and ten year contract plan. They have made partial payments on those lands, and have gone into possession and made improvements. Now, what I want to know is, will their rights be entirely preserved by this bill? If not, I desire to have it amended so they will.

MR. LACEY: It seems to me there is no question about that, as to settlers who buy the land from railroad companies having lands granted to them by acts of Congress. After the settler buys a patent is issued to the railroad company. That patent at once inures to the benefit of the purchaser, and he having bought the land and subsequently held it in good faith would be protected by the provisions of this bill. That was the intention of the bill. I think it is fully broad enough to cover it. In addition to that, sections 3 and 4 have been added, giving opportunities to the settler to have his title confirmed in the Department of the Interior. But we have in the closing words of this first section provided expressly that the title of *bona fide* settlers is not only protected by the limitation, but it is affirmatively confirmed by the act itself.

MR. HARTMAN : You will observe, though, that the language says that " no patent " to any lands held by a *bona fide* purchaser, and so forth, shall be affected. That contemplates the previous issuance of a patent.

MR. LACEY : Not at all.

MR. HARTMAN : If there has been no issuance of a patent, but the railroad company have simply taken the land under the grant, and then have sold it to purchasers, and those purchasers have paid all or a portion of the purchase price, how are they protected ?

MR. MCRAE : The gentleman from Montana must remember that this bill only deals with patented lands. As to the class of settlers he refers to, their rights will be determined under the forfeiture act of 1890 or any other act that may be applicable.

MR. LACEY : The act of 1887.

MR. MCRAE : This only deals with erroneously patented lands.

MR. LACEY : The class of settlers referred to by the gentleman from Montana is not affected one way or the other by this bill.

MR. HEPBURN : I desire to ask my colleague one question about this. There are, in the state which he and I represent in part, over 3,000,000 acres of land that might be affected by this statute. There is a provision here that the lands held by the *bona fide* purchaser shall not be harmfully affected, that is, so far as the annulment of the patent is concerned, but there may be a suit against every one of the holders of that land unless they do something to establish to the satisfaction of the Secretary of the Interior that they are *bona fide* owners. Will not this impose upon every one of these men the necessity

of establishing that fact before the Secretary of the Interior?

MR. LACEY: No, it will not.

MR. HEPBURN: No man will be certain until the five years have elapsed that he may not be the defendant in a suit, for he cannot tell what particular patents it is the purpose of the Secretary to attempt to invalidate, and his only safety in avoiding that litigation is by himself taking the initiative to satisfy the Commissioner that he holds by a *bona fide* title. To my mind, Mr. Speaker, it throws the cloud that may result from the fear of litigation upon every one of these acres of land and continues it for five years.

MR. LACEY: Not at all. The cloud is simply in the mind of my friend. We have carefully considered that question. That limitation will expire absolutely on the 3d of March. It only runs about two weeks now, and the present bill does not extend it.

MR. HEPBURN: Their title would then be perfected?

MR. LACEY: The title would then be perfected. It has been amply cared for, and if they desire to avail themselves directly of section 2 they may do so, or other persons can do it for them; and it is only, as I have said, to run two weeks longer.

MR. HEPBURN: But if this law runs what would prevent the Secretary of the Interior from bringing his action for the annulment of patents of every one of these acres during any part of the limitation fixed?

MR. LACEY: The act of 1887 and 1891 require that there shall be ninety days within which the settlers

or any person against whom an action can be brought shall be notified and demand for reconveyance made, and the limitation expires in two weeks, so that is is impossible for the Government to make the demand, as the ninety days expire within two weeks. The whole matter has been carefully guarded in this bill.

MR. HEPBURN: Does not this simply extend the provisions of an act amended relating to where another party has gone on the land afterwards?

MR. LACEY: It does as to the original patentees, while the land remains in their possession, but where the land has been sold to an outsider or a *bona fide* settler the rights of the *bona fide* settler are protected.

MR. HEPBURN: But how about that? Is this changed in order to prevent litigation? Is it to put a limit upon the power of the Secretary to prevent these suits, which must be done by the holder of the present title by showing to the Secretary that he is a *bona fide* settler?

MR. BOWERS: His ninety days' notification will expire before that time.

MR. LACEY: The limitation provided in the act of 1891 expires on the 3d day of next March, and these men are protected, therefore; and the second section was drawn after consultation with gentlemen from my friend's district, where the most of these lands [**1765**] in Iowa are situated, and this section was put in to protect them if anything should happen between now and the 3d of March; and I am able and glad to say that the rights of the men now living in the Eighth district of Iowa have been carefully guarded by the bill.

MR. HARTMAN: In view of the fact that there seems some question as to whether the rights of the *bona fide*

purchasers in lands which have been patented from the railroad companies are to be protected fully here, would the gentleman have any objection to accepting an amendment to section 1 on this line, so that the last clause should read, "But the right and title of any purchaser of lands granted to any railroad company shall be, and they are hereby, confirmed to such purchasers subject to the full payment of the contract price therefor?" Would the gentleman have any objection to such an amendment as that, which eliminates all doubt?

MR. LACEY: That raises another question that was not considered by the committee. It was not involved in our examination, and not necessarily involved in this bill.

Now, Mr. Speaker, this bill only deals with patented lands. When a patent is issued for a quarter section of land held by some person whom my friend has in his mind now, under the act of 1891, and an action may hereafter be brought at any time within six years from the time at which that patent may issue, and this bill changes the time to ten years instead of six, so that this bill does not affect them in any way injuriously as to the patents hereafter to issue, but only deals with patents heretofore issued.

MR. HARTMAN: Do you mean to say that within five years from the date it changes the time in which patents will issue in the future? How is that?

MR. LACEY: It was proposed both ways in the committee.

MR. HARTMAN: Do I understand the gentleman to say this: If any purchaser of land for which patent has not already issued to a railroad company has made a part of his payments upon those lands, and we

will say the next year patent issues, that within ten years from the date of the issuance of that patent an action can be brought against that *bona fide* settler?

MR. LACEY: Certainly.

MR. HARTMAN: Then I submit that you are not doing anything to protect the rights of the *bona fide* settlers.

MR. LACEY: The gentleman does not understand the situation.

MR. HARTMAN: I have about 2,000 constituents who are interested in just such matter.

MR. LACEY: Let me explain, and I think you will agree with me. The bill contemplates that in a case where a railroad company should have sold lands outside of its grant, and by mistake that land should subsequently be patented to the railroad, an action to cancel that patent will be limited to ten years; and the act of 1887 fully protects the men who are situated like those you speak of. They are entitled to a prior right in their land, and their rights are fully protected by the act of 1887. But this bill had no such purpose in view. It does not intend to confirm the title of the lands in the railroad company that may have been heretofore sold beyond the limits of its grant.

MR. HARTMAN: Admitting that to be true, surely the gentleman does not pretend to say that the rights of a party who has bought land in good faith of a railroad company and paid his money for it, and gone on and made his improvements and expended large sums of money in that way, are protected by a bill which simply gives him a preference right to locate upon the land and buy it again from the Government?

MR. LACEY: How could a man buy in good faith from a railroad company lands that were 40 miles, or even 3 or 4 miles, outside the limits of the grant?

MR. HARTMAN: Oh, that is an exceptional case. That does not apply to one case in a thousand.

MR. LACEY: Well, that is the only class of cases that will be affected by this bill. It is in the main a question of divisional lines, as to whether the grant covers the quarter section or falls short of it, and if a man bought lands before the grants were adjusted and patented, from somebody who did not own those lands, he can, under the act of 1887, procure the patents to be issued to himself, and thus be fully protected. On the other hand, in Montana a number of patents have been issued for lands that did not belong to the railroad company and which has sold them, and those purchasers are fully protected by this bill, notwithstanding the fact that the Government patented lands to the railroad company that the company was not entitled to.

I now yield to the gentleman from Arkansas [Mr. McRae].

Mr. McRae rose.

MR. PICKLER: Before the gentleman from Arkansas enters into the discussion of this bill I want to ask him a question. I observe that his amendment contemplates an amendment of the timber-culture law. I want to ask him whether this bill or the substitute affects the timber-culture entrymen?

MR. MCRAE: It proposes to reveal section 8 of that law, not the whole law. If the gentleman will read the substitute he will see that it applies only to section 8.

MR. PICKLER: Well, does that in any way affect timber-culture entrymen?

MR. MCRAE: Not at all. I shall not attempt, Mr. Speaker, to discuss this bill in detail. I think that in

some respects it is very imperfect, even along the lines that a majority of the committee have agreed upon, but if the committee amendments are adopted it will be improved. The point to which I ask consideration of the House is this, that the statute of limitation should be repealed outright. I do not believe that there should be a statute which would prevent the Government from bringing suit to correct mistakes and frauds committed by its agents or otherwise. In 1806 there was a statute of limitations passed prohibiting suits brought on the bonds of United States marshals, and that is the only statute of limitation passed during the history of this Government until the act of March 3, 1891, which is involved in this bill, and it produced such a condition of affairs in the Department of the Interior as made it necessary to call the attention of Congress to it by a special message from the President. Now, sir, the very presence of this bill is the strongest argument that I could make for the position I assume.

It demonstrates the danger of all such legislation. It shows how easy it is to defeat justice and promote fraud when there is a statute of limitation that validates the latter. The experiment made by the Fifty-first Congress in passing the act of limitation ought to convince us that there should be none, because here we are with a large part of the railroad grants yet to be adjusted and the time fixed by that law practically out. We are urged by the Executive to act promptly, and yet on account of bonds and appropriations and other reasons it is a month before we get consideration in one branch of Congress. Millions of acres of land belonging of right to the homeless people will by reason of mis-

takes and frauds be lost unless we can get the concurrence of both branches and the Executive to repeal or extend the limitation against suits. The railroads want the bar to attach, and it will be hard to prevent it now.

I introduced and the last House passed a bill to repeal section 8 of the act of March 3, 1891, but no action was taken in the Senate. It may not act now. I believe that the Government, which must act through its agents, will necessarily at times have some who are incompetent, careless, or dishonest, and that it should not be bound by the doctrine of estoppel or laches like individuals who have their free volition to act at once.

MR. TAWNEY: How much time has the Government had to adjust these patents?

MR. MCRAE: Since when does the gentleman mean?

MR. TAWNEY: Since the mistakes of the Interior Department were made. The gentleman was speaking about not holding the Government responsible.

MR. MCRAE. I do not know how many mistakes have been made. We can not tell until the adjustments are made.

MR. TAWNEY: But mistake is the basis on which the adjustments are asked for.

MR. MCRAE: The investigation and adjustment may show that a great many mistakes have been made.

MR. TAWNEY: Well, there ought to be some limitation.

MR. MCRAE: That is the very point where the gentleman and I do not agree. I am trying in my feeble way to show that there should be no limitation.

I insist that a sovereign government which is compelled to act through its agents ought to be at liberty at any time to expose frauds perpetrated or mistakes

committed by those agents. When the certification and listing of railroad lands was first inaugurated the lists were made, not because they were regarded as patents, but simply as notice to all the world that the lands were claimed by the railroad companies. These lists were oftener than otherwise prepared by the railroad companies and signed by the Department officials without much examination, under the supposition that it bound no one and that all errors could be corrected when patents were applied for.

In the course of time, however, the Land Department, which has grown and increased in importance with the years, eventually decided that these certificates made after this imperfect examination possessed the same binding force in law as patents. By the second section of this bill the certificates are treated as patents, and yet we are told that there should be a limitation against exposing and correcting the frauds that have been carried or may be carried into certificates obtained in this way. It is a dangerous policy, and will cost us much in the end. No harm can come to any honest settler who holds by purchase in good faith under the act of March 3, 1887, for by it he is secured in all of his rights. I do not object to any reasonable protection to settlers and honest purchasers, but I do not want corporations and syndicates to hide their frauds behind imaginary settlers.

My proposition is to give the President what he asks for, to give the Department what it ought to have and what it has always had until the act of 1891, and then hold them responsible for errors and frauds. If you will do this you will hold over the heads of [1786] all

corrupt agents who might be induced to perpetrate a fraud the fear of exposure and punishment, but if you fix a limitation you offer a premium to corruption. Many of the sharp, shrewd representatives of railroads will be able to cover up for a limited period frauds of the greatest magnitude, and thus dishonestly take from the settlers millions of acres of land which they ought to have and could get but for the validation of such frauds by laws like the one proposed.

I think the proper thing to do is to repeal the whole limitation clause; but if you can not see your way clearly to do that, the next best thing is to pass the first section of the bill the committee recommend.

MR. UNDERWOOD: Mr. Speaker—

MR. LACEY: I had an understanding with the chairman of the Committee on Agriculture, and also with the Chair, that this bill would have been called up earlier in the day, in time to be disposed of without delaying the Agricultural appropriation bill. I only ask now that the further consideration of this bill be postponed, retaining its present status, until the Agricultural appropriation bill is disposed of.

MR. LOUD: I have no objection to letting this bill go over until we dispose of the agricultural bill; but I have no disposition, in view of the fact that the Chair has already held it to be privileged, to agree that it shall retain its present status. I would not feel inclined to grant it any extraordinary privilege over and above what the bill now carries.

If it is amended to suit me, and as I have suggested to the gentleman from Iowa, by striking out these allusions to the Mexican-Spanish grants, that will be another matter.

MR. LACEY: Well, that is a matter on which we can confer personally hereafter. I have no objection to it myself.

THE SPEAKER pro tempore (MR. GROUT): The gentleman from Iowa asks unanimous consent that the further consideration of this bill be postponed till the conclusion of the agricultural bill, and then to be taken up, following it immediately, retaining its present status. Is there objection?

MR. LOUD: To the latter part of the proposition, Mr. Chairman, I must object.

MR. LACEY: Then objection is made, and we will have to go on with the bill.

MR. MCRAE: Would it be in order to postpone the further consideration of the bill until Monday or Tuesday or any other day the gentleman from Iowa may suggest? It will not lose its privilege, as I understand.

MR. LACEY: I will make the suggestion, in view of the arrangement with the chairman of the Agricultural Committee, that the bill go over. I move to postpone the further consideration of the bill until the Agricultural appropriation bill is disposed of.

MR. LOUD: If the request of the gentleman from Iowa had been put in that language I should not have objected to it.

MR. LACEY: I understand the gentleman from California objects.

MR. LOUD: No; I said that I should not object to the language of the suggestion now made by the gentleman from Iowa that this bill simply go over until after the Agricultural appropriation bill is disposed of. What I do object to is the attempt that the gentleman has made to make it privileged.

MR. LACEY: I ask also that it retain its privileged character.

MR. LOUD: But the Chair has already decided that the bill is entitled to a privilege which would not be interfered with, I suppose, by letting it go over. The bill would be entitled to the same privilege at any other time that it is entitled to now.

THE SPEAKER *pro tempore:* Is there objection to the request of the gentleman from Iowa?

MR. UNDERWOOD: I did not understand the request. Will the Chair please state it?

THE SPEAKER *pro tempore:* Unanimous consent is asked for the postponement of the further consideration of the bill until the conclusion of the consideration of the Agricultural appropriation bill, and then to be immediately resumed.

MR. LOUD: Ah, Mr. Speaker, but that was not the request, as I understand it, which the gentleman made. The motion was to postpone the bill until after the Agricultural bill was disposed of.

THE SPEAKER *pro tempore:* The Chair is conscious that he added the latter clause. The request is that the further consideration of this bill be postponed until the conclusion of the Agricultural appropriation bill. Is there objection?

MR. UNDERWOOD: Do I understand the Chair to hold that the bill does not lose its privileged character?

THE SPEAKER *pro tempore:* The Chair understands that it loses no privilege which it now possesses. Is there objection to the request that the bill goes over?

There was no objection.

[1904] HOUSE OF REPRESENTATIVES.

Tuesday, February 18, 1896.

SUITS TO VACATE PATENTS UPON PUBLIC LANDS.

MR. LACEY: Mr. Speaker, I desire to call up the bill (H. R. 5474) to provide for the extension of the time within which suits may be brought to vacate and annul patents upon public lands, and for other purposes. This is the bill that the House was considering and which was temporarily laid aside in order to dispose of the Agricultural appropriation bill. It has been read in full, and is now pending upon the amendments submitted by the committee. Perhaps there ought to be some brief explanation of the measure. I will occupy only a moment in refreshing the memory of the House upon the subject.

This bill has been prepared by the Committee on Public Lands in response to the President's message which was laid before the House on the 17th of January last. A question arose the other day as to the insertion of the proposed amendment to include the Mexican and Spanish grants. I can only say for myself that I did not favor that amendment. A majority of the committee, however, supported it, and it was, therefore, reported to the House. These Spanish and Mexican grants are very ancient; they date back to the earliest recollection of old men now living; many of them had their origin in a past generation. The limitation provided in the act of 1891 will, if not interfered with, become absolute on the 3d day of next March. Speaking only for myself, I have no objection to the modification of that part of the bill, so as to include railroad and wagon-road grants only, omitting the

proposed provision in regard to Mexican and Spanish grants. Some member of the committee who favored this proposed amendment would perhaps like to be heard on the other side of the question.

MR. UNDERWOOD: Mr. Speaker, I rise to state the reasons why I do not favor this bill in the form in which it is before the House. I am one of the members of the committee who have joined in filing a minority report. I am in favor of extending the time allowed the Government for forfeiting these public-land grants, but I do not favor the report of the majority of the committee. While I prefer the bill as reported by the majority to no legislation at all, my views are represented by a substitute which the minority of the committee have offered, and which simply repeals the statute of limitations passed in reference to these lands and fixes no time of limitation. Let me state my reason for preferring no limitation to an extension of the present limitation of five years.

The Government of the United States can act only by and through its agents. Those agents are appointed at different times, usually changing office with each new Administration. They can not always keep themselves fully advised as to the public business, nor can they watch the interests of the United States as an individual can watch and protect his interests. Matters of grave importance with reference to these public lands may escape the attention of agents who have recently come into office. I know of no limitation that has ever been adopted by any State on any question except on the assumption that by reason of lapse of time the presumption has arisen that the title was perfected or the claim vested in the party exercising the right thereto.

Now, we know that today the Government of the United States claims that a large amount of these public-land grants should be forfeited, that the railroad companies to whom they were made have received, either through mistake or fraud, a large quantity of public lands to which they were not entitled. Now, I believe that the Government ought to give the railroad companies every acre of land that it agreed to give them. The land bounties were offered in order to secure the building of these great railroads, and the companies are entitled to the lands which the Government agreed to give them. But, Mr. Speaker, they are not entitled to land which was not covered by those land grants; and so long as the land remains in the hands of the railroad companies or the original patentees there can be no injustice done if the Government takes back that which properly belongs to it.

But it is contended that if these grants be forfeited it will work injustice to innocent purchasers from the railroad companies or from the patentees. If that were the case, I would say that as the Government has issued its certificates of patent, which have gone into the possession of persons who did not know that the railroad companies or the patentees had entered lands to which they were not entitled, we ought to protect such innocent purchasers. But I say that under the law as it stands to-day the courts of this land have thrown ample protection around those innocent purchasers.

Under the law as laid down by the Supreme Court of the United States, no man who has really purchased any of this land as an innocent purchaser can be affected or harmed by the repeal of this statute. In support of that position, Mr. Speaker, I might refer

to a number of cases. The act of 1887 itself protects innocent purchasers. I will not occupy the time of the House in reading many cases (for there are many which support my position); I will refer to only one decision, that of the Supreme Court of the United States in the case of the United States *vs.* The California and Oregon Land Company, decided only about two years ago. In that decision (which was delivered by Justice BREWER) the court expressly decides that innocent purchasers under these land grants are protected. **[1905]**

I send the decision to the desk and ask the Clerk to read the portion I have marked.

The Clerk read as follows:

"The right, therefore, of this defendant, the California and Oregon Land Company, to avail itself of a plea cannot be doubted, and the plea which it made in the case, that of a *bona fide* purchaser, is one favored in the law. In the act directing these suits was a clause 'saving and preserving the rights of all *bona fide* purchasers of either of said grants, or of any portion of said grants for a valuable consideration, if any such may be.' In Story's Equity Jurisprudence, section 411, the author says: 'Indeed, purchasers of this sort (*bona fide* purchasers) are so much favored in equity that it may be stated to be a doctrine now generally established, that a *bona fide* purchaser, for a valuable consideration, without notice of any defect in his title at the time of his purchase, may lawfully buy in any statute, mortgage or other incumbrance upon the same estate for his protection. If he can defend himself by any of them at law his adversary will have no help in equity to set these incumbrances aside, for equity will not disarm such a purchaser, but will act upon the wise policy of the common law, to

protect and quiet lawful possessions and strengthen such titles.' And the reason of this is given in Boone vs. Chiles (10 Pet., 177, 210), as follows: 'This leads to the reason for protecting an innocent purchaser holding the legal title, against one who has prior equity; a court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction. Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser who has put himself in peril by purchasing a title and paying a valuable consideration without notice of any defect of it or adverse claim to it' (see, also, Lee vs. Polk Copper County Company, 21 How., 493, 497, 498; Croxall vs. Shererd, 5 Wall., 268).

"In United States vs. Burlington, etc., Railroad Company (98 U. S., 334, 342) it was said: 'It (the United States) certainly could not insist upon a cancellation of the patents so as to affect innocent purchasers under the patentees.' And again, in Colorado Coal Company vs. United States (123 U. S., 307, 313): 'It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the preemption claims and in the certificates issued thereon. This undoubtedly constituted an equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title of the patents. It follows that to a bill in equity to cancel the patents

upon these grounds alone the defense of a *bona fide* purchaser for value without notice is perfect.'

"The land company therefore has a right to set up a special plea, and the plea which it did set up, that of a *bona fide* purchaser, was sufficient, if true."

MR. UNDERWOOD: Mr. Speaker, the decision of the highest court in the land has sustained the proposition that these innocent purchasers are protected, though it may be contended that they ought to go into court and establish that they are *bona fide* purchasers, while under this bill, or any act that you may pass, if the Government of the United States sees proper to raise the contention that they are not *bona fide* purchasers they will have to go into court to maintain the proposition that they are innocent purchasers.

You can not say that the Government shall not litigate, if you are going to pass any bill that will authorize the forfeiture of these land grants; and I contend if you pass the bill as it stands instead of the amendment, that in attempting to try to give these innocent purchasers what the law already gives them you will cut off the rights of other innocent persons to these transactions.

There are certain cases where the patentee—the homestead settler—went on the land first; entered and took up his homestead and the railroad company also filed its line of definite location and asked a certificate for particular classes of land so covered. Although the settler was first in possession of the land, although he is an innocent purchaser, under the law the railroad company, having filed its claim with the General Land Office first, has the first standing with the Government; and yet, in some of these very

cases, and in many of them, there are instances where the railroad has improperly entered land and is claiming land that does not properly come under the grant. That line of cases has been covered in the decision in the United States *vs.* The Winona and St. Paul Railway Company and Thomas Marshall, jr., reported in 69 Federal Reports, page 948.

If you pass this act you absolutely cut off any right of the Government to protect the men who went on as *bona fide* holders and entered their homesteads on the land. But if you repeal the act entirely, as we ask in the substitute, you leave the question open, so that, as to the lands the roads have improperly taken, the Government can forfeit them, and it leaves the homestead settler in possession of his home.

Another view I take in reference to these purchasers—the innocent purchasers (and the Government, I say candidly, ought to protect all of them) —under the existing law, under the statute of 1887, and the decisions arising under that act, similar to the decision I referred to and had read from the desk, all of these people are protected. The courts have gone through that law and have construed it; the settlers know what it is; there is no doubt and nothing left for construction; but if you put a new law on the statute book you establish something that before it is settled must be construed, and you all know that before this statute can be construed some time must elapse, and you only increase the amount of litigation that the settler will be subjected to instead of lessening it.

For that reason I advocate the substitute that is offered by the minority instead of the bill that is offered by the majority; but I say we ought to have

some legislation, and if the House is unwilling to accept the substitute, then I shall vote for the bill offered by the majority.

MR. HEPBURN: I move to amend section 1 of the bill by adding:

"*Provided*, That all lands patented or certified to any state, corporation, or individual, under the rulings or constructions of law of the Commissioner of the General Land Office, or the Secretary of the Interior, at the time of the issuance of said patents or certificates, and when no fraud has been committed by the agent of the State or corporation or by the individual, shall be excepted from the operation of the provisions of this act as to extension of time and bringing of suits, and of the act approved March 3, 1887, entitled 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes.'"

Mr. Speaker, in the district in which I live there are at least 200,000 acres of land granted to the State of Iowa, to aid in the construction of railroads, nearly forty years ago. This land grant was adjusted and the certification made in 1859. Thirty-seven years have elapsed since the corporation taking under this grant from the State became the owner of these lands. Every acre of this land was sold many years ago, and is now in the hands of settlers—of farmers. In my judgment this bill, notwithstanding the opinions that have been presented here by some gentlemen, does disturb this class and throws a cloud upon every one of these titles.

It is true that there is a clause in this bill whereby at the end of litigation or by filing evidence of the

title of the new holder he may not be seriously disturbed. But no one of all those settlers knows what particular tract of land will be selected by the Secretary of the Interior under the act of 1857 as the subject of litigation. Every man's land is clouded with the thought, with the certainty, that the Secretary of the interior may institute a suit against him. He may be conscious of his ability to defend himself, but he does not want to go to a Federal court, possibly 100 or more miles away, into a community in which he is a stranger, and there make his defense. He can not do it without incurring expense.

Now, Mr. Speaker, this is a matter of importance. Only a week ago one of my clients wrote to me that, under the act of 1887, although he had his certificate, his duplicate—which under the laws of the State of Iowa is all the evidence of title that he needs—although he has held that for more than forty years, he has recently been notified by the Department that under the readjustment of that department, going over the old entries, they have discovered that his land was within the limits of a railroad, and was double-minimum rather than single-minimum land. On those lands he had located a Mexican land warrant, paying the difference for the fractional quarter. He was notified of the annulment of his patent, and required to pay the additional sum that would make the aggregate of the double-minimum price, after forty years. I say that is not right, and that there ought to be a statute of limitations that would be a bar against the Government as against individuals.

There is no reason why the officers may be negligent for forty years and then at the end of that time

come upon a purchaser, as in this case, not the original purchaser, and require the new owner to make this payment. The other man is dead and gone long ago and his estate has been settled, so there is no possible redress for the present holder. It is not right or proper.

The gentleman from Arkansas [MR. MCRAE], in a speech that he made to this House the other day, told the House that the statute of 1887—to be continued in its operation by this act—was a statute for the recovery of lands fraudulently obtained from the Government. I have taken occasion to make inquiry, and I find that in all of the adjustments in every case where the company has been required, under the provisions of the act of 1887, to make reconveyance, in not a single instance has there been an allegation of fraud.

These cases do not arise even from any mistake of fact. There is neither mistake of fact nor fraud involved in this. They grow out of the changes of construction by the officers today differing from those of the officers of twenty, thirty, or forty years ago. For instance, years ago the Department held that in case of a fraudulent preemption, or where a preemption had been abandoned, the preemption entry did not serve to extract the land from the operation of the donating statutes. Under that, in cases of that kind, where the preemption filing had been made, but abandoned, or shown in contest to be fraudulent, the lands were certified to the State, and from the State of Iowa to the railway company. The Department has recently changed that ruling, perhaps under a late decision of the Supreme Court, which holds that that kind of an entry did serve the office of extracting those

particular lands from the operation of the granting statute.

Although these lands were long ago certified to the company, although they have sold them, now they require the company to [1906] reconvey the lands conveyed to them long ago, which requires the holder of those lands to show that he is at present a *bona fide* holder in order to prevent the institution of suits against him, and in failure of that, requires him to go to a distant court to make defense to show that he is a *bona fide* holder. I do not believe that there is any justice in that.

The gentleman from Arkansas [MR. MCRAE] the other day said in his speech to the House that these certificates were a mere matter or form (substantially he said that), prepared often by the railroad companies; that their office was simply to serve as notice that those particular lands were claimed by the railway company as lying within the grant. The gentleman was certainly mistaken. This form of patent, this method of certification, was authorized by the statute of 1854. They take the place of patents in land grants. The Federal courts have held that they serve every purpose of patents, and all of the grants that have been made to the State of Iowa or to the railroad companies within that State not one acre is to-day held under any other muniment of title than such a certificate as the gentleman told us the other day was a mere formal something intended to serve the purpose of notice.

They were authorized by the statute of 1854. At the time of some of the earlier grants his own State was one of the grantees under the act of 1849 of the swamp lands lying within her borders, and the State of Illinois was a grantee under that act to aid

in the construction of the Illinois Central Railway. It makes them muniments of title. It was found to be an impossibility almost for the old form to be observed and for patents in each individual case to be issued. It was an almost indeterminable work, and then the act of 1854 was passed, and it has all the effects, so far as taking its title from the Government is concerned, of the most formal patent that ever was issued in the world.

Now, Mr. Speaker, these lands were patented and have been occupied for thirty or forty years. There is no reason or justice why repose should not be given by statute to all of these titles. If we simply allow time to pass, repose will be given to every one of them on the 3d day of next March, and no one of these settlers can be disturbed. In some of the proposed suits, I learned from the district attorney of the district in which I live, it will be necessary in carrying out the provisions of the act of 1887 to make 2,000 people defendants to these suits. Two thousand people! In these particular cases, when it is all done, what boots it to the Government? It is a conflict between the beneficiaries of two grants.

The Government granted land to the State for swamp-land purposes, and the Government granted land to the State for railroad purposes. There was a conflict between the company and certain counties, who were in their turn grantees, as to who was the owner. These disputes were all composed twenty or twenty-five years ago by compromises and concessions, the one or the other party quit-claiming as to the other. The Government has no title of any kind. It is a conflict that they are proposing to carry on with reference to grants, and when this is all settled, at an

expense of infinite litigation, not an acre goes to the Government. Why, then, should we not give repose in this class of cases?

In another instance that I am familiar with, Mr. Speaker, in your own State [MR. MERCER in the chair], there was a grant to a company when practically, by an error or an oversight on the part of the officers of the United States, the lands lying on the line on either side of the file plat of the road were not withdrawn from market for a considerable period. Settlers came in and took these lands. Later, when the railroad was constructed, it was found that there was not within the limits of the grant a sufficient quantity to meet the purposes of the grant. The Department held that lieu lands might be given—lands in another locality—and the company was compelled to go away beyond its grant to lands that did not have the benefit of the construction of the road and take 201,000 acres, and one block of 10,000 acres of it they sold for $2,500—25 cents an acre; but they took these lands under the then ruling of the Department.

Under the advice of the law officers of the Department, subsequently the Department changed its view. When this was done men of eminence held the position. The lists were not made by railroad attorneys. Some of the lists of which I am speaking bore the signature of Thomas A. Hendricks, the then Commissioner of the General Land Office. He was not a man who transacted his business in the loose way characterized by the gentleman from Arkansas. He was certainly mistaken in the statement that he made that that ruling was adhered to until quite recently. Then they changed the ruling and held that lands must be taken within the prescribed limits or else the entries

and selections were void. Now, one of the suits ordered is to recover the title of these lands taken in lieu af those that the company lost through the failure of the Federal officers to withdraw their lands from market.

I am not prepared to say that successful tests might not have been made, but they elected to take the other course and leave the settlers in quiet occupation. Now, sir, these lands in turn are settled. They are not in the hands of corporations, and if my amendment is adopted, every recovery can be had except in cases where the mistake has occurred —if it is a mistake, for I want to say to gentlemen that any lawyer will agree that these are close questions about which men may well differ, though the party in power has said otherwise.

Every acre, I say, will be recovered where a mistake of law, not of fact, a misconstruction of law, an improper ruling, has been made by the officers of the Government, and, in addition to that, where no fraud appears. If there is fraud, notwithstanding the fact that the error was that of the representatives of the Government, recovery may be had. Now, if there is no question of fact; if there is no fraud; if there is *no* right save that which is grounded in a charge of ruling or construction, I submit that there is no such equity, no such justice, no such condition of affairs as to justify either the remarks made by the gentleman from Arkansas [MR. MCRAE] the other day or the demands that are made by the provisions of this bill. I hope that the amendment which I have offered may prevail.

MR. LACEY: Mr. Speaker, this bill, in every line of it, from the beginning to the end, was drawn with special reference to the protection of the rights of *bona*

fide purchasers. As to the instance that my colleague cites as having occurred in Nebraska, I propose at the proper time to offer an amendment which I think will cover the points he has in mind. I will send the amendment to the Clerk's desk to be read as a part of my remarks, so that it may appear in the RECORD for the information of members.

The amendment was read, as follows:

"Add at the end of section 1: '*Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.'"

MR. HEPBURN: Mr. Speaker, I hope my colleague will not offer that until a vote has been had on my amendment.

MR. LACEY: I do not propose to offer it at this time. Let me now briefly call the attention of the House to a difficulty in relation to one of the points embraced in the amendment of my colleague, which is this: His amendment provides that where patents have been erroneously issued without fraud they shall be confirmed. Now, these patents were erroneously issued frequently by the mistake in law or fact of a twelve-hundred-dollar clerk, and subsequently the Supreme Court of the United States decided that they were issued through mistake in the construction of the law. Evidently, if any of the lands thus patented to the company, which it does not own and ought not to have, are still held by the company, they ought to be reconveyed.

This bill protects the title where the lands have

been sold, but if any of those lands are still in the hands of the company there is no reason why the patentee should not give them back if they have been erroneously patented, even though there was no fraud whatever. The amendment I have suggested will protect the interest of the settlers on these lands and at the same time it will leave the Government the privilege of acquiring again the titles to unsold lands that were erroneously patented.

MR. MCRAE: Mr. Speaker, I do not understand that the general debate is closed, or that the amendment of the gentleman from Iowa could be considered at this time. I understand it has only been read for information.

MR. LACEY: It has only been read for information.

[1934] HOUSE OF REPRESENTATIVES.

WEDNESDAY, *February 19, 1896.*

SUITS TO VACATE PATENTS UPON PUBLIC LANDS.

MR. LACEY: I call for the regular order.

The House, as the regular order, resumed the consideration of the bill (H. R. 5474) to provide the extension of time within which suits may be brought to vacate and annul patents upon public lands, and for other purposes.

MR. LACEY: I ask my colleague [MR. HEPBURN] to withdraw his amendment now pending until we can dispose of the amendments reported by the committee.

MR. HEPBURN: For the purpose suggested, I withdraw my amendment for the present.

MR. LACEY: Now I desire to call for a vote on the committee amendment to insert before the words "spe-

cial grant" the words "railroad, Mexican, Spanish, or other." So far as I am concerned, I think this amendment ought to be voted down, though I do not feel at liberty to withdraw it. The amendments which other gentlemen desire to offer can come up later.

MR. LOUD: I wish to submit as a substitute for the amendment of the committee an amendment which I think will cover the whole proposition.

MR. LACEY: Let it be read.

MR. LOUD: I will read it myself.

"In line 5 strike out the words 'special grant' and insert in lieu thereof 'railroad or wagon-road grants.'"

[1935]

MR. LACEY: I am not at liberty to accept that on behalf of the committee, but I think it ought to pass; and I call for a vote.

The amendment of the committee and also the proposed substitute of Mr. Loud were read.

MR. DOLLIVER: We would like to have a statement of the effect of this amendment.

MR. LACEY: The effect will be simply this: The language of the original bill is "special grant." The substitute of the gentleman from California proposes to strike out those words and to insert the words "railroad or wagon-road grant," covering the two classes of grants in the adjustment of which the Department is now engaged.

There is no question of adjustment as to the grants to individuals; but the amendment proposed by the committee is broad enough to open up the entire question as to Mexican grants, the Spanish grants, and other special land grants mentioned in the bill. Now, if the substitute of the gentleman from California [MR. LOUD] shall be adopted, it would eliminate everything

from the bill in relation to the Spanish, Mexican, and other special grants, and would leave them untouched, and confine the scope of the bill to the railroad and wagon-road grants.

MR. MCRAE: Mr. Speaker, I am very much surprised that the chairman of the Committee on the Public Lands, who reported this bill with the committee amendment as printed, now recommends its abandonment. With that amendment out and nothing substituted, there is nothing whatever in the bill that would be of much value to the Department or the settlers.

MR. LACEY: I do not think my colleague heard the proposition correctly. Something is substituted for the amendment of the committee. But all the Spanish and Mexican grants are eliminated from the bill, and we insert in lieu thereof the railroad and wagon-road grants. So that the whole matter is substituted except as to the Spanish and Mexican grants, upon which, as the gentleman remembers, we were not fully agreed in committee, and yet it was a question, in view of the fact that there was no special opposition to it, that we did not care to call to the attention of the House excepting in the shape that has been presented in the bill.

MR. MCRAE: Mr. Speaker, the hearings before the Committee on Public Lands showed that some of the most outrageous frauds that were alleged to have been perpetrated were in connection with these grants to which the gentleman has referred. I have in mind a single Mexican grant made, if made at all, when the Mexican law did not permit the granting of more than 11 leagues of land to any one individual, and yet it has been so surveyed and manipulated by the officers of the Government that it now includes 14 leagues of land;

and we are informed that there are people in that vicinity who desire to enter these public lands as homesteads and they want the Government to at least purge the grant of fraud. If the amendment of the gentleman from Iowa [MR. HEPBURN] is adopted, then all patents and certifications are confirmed, and we will be deprived of all right to investigate as to the validity of the original grant, the survey of it, or any fraud or mistake connected with its confirmation. I think that all of these grants, railroad, wagon-road, Mexican, Spanish, and special, should be put upon an equal footing and adjusted upon the same basis. There should be no special exceptions in favor of any of them.

The gentleman who spoke on yesterday questioned some statements of mine which were made in the discussion of the bill on a previous occasion. The information I gave to the House was, in substance, such information as came to the committee in the hearings on the bill; information that came from the Department which is supposed to know something of the early practice in making lists for railroads; information which I believe to be true, notwithstanding the denial of the gentleman. But, Mr. Speaker, if I am in error in stating that many of these lists were made under the impression that they should not be treated as patents, and if the gentleman is correct in stating that they were always treated as patents, then all the certificates behind which the gentleman undertakes now to shelter the railroads are the more outrageous, because he admits that there are many mistakes. I made no charge of actual fraud against the Department. I prefer to believe and would exonerate, as far as possible, the gentleman who made up the list. I

know that the Commissioner, whoever he was, could not personally examine the tract books to find mistakes, and that he signed the lists prepared for him. I adopted what appeared to me to be a reasonable excuse for these errors. Now, if that is not true and these men knew that these lists were to have the force of patents, then the thousands of errors which are in many cases admitted, and in all cases in favor of the grantees, drive us to the conclusion that they were procured by corrupt methods either on the part of the railroad companies or the Government.

Now, Mr. Speaker, there is a class of settlers, and they have been entirely overlooked in the consideration of this bill, that is, those who claim under the public-land laws, whose rights should be protected in some way. This bill does protect, and it seems that its main object and purpose is to protect, purchasers from railroad companies. But little has been said and nothing done for the settlers who claim under the public-land laws of the United States. The interests of these two classes of settlers often conflict. For instance, A buys from the railroad company, which has an erroneous certificate or patent, as the case may be; B applies to enter the land under the homestead law, and alleges that the land did not pass to the railroad company and is of right a part of the public domain.

Now, this bill will confirm the land to the purchaser from the company and defeat the settler who has undertaken to claim under the public-land laws. There are many such settlers, but they have few friends here. That is the class I wish to protect first of all. They have stood in the breach and contested every inch of ground with the corporations from the time the grants were made, and yet they are now to be

denied the right to take the land because the road has sold it to some speculator. I deny that this is right or just to claimants under our public laws. The proposition would confirm and fully protect the railroads. But no effort has been made to aid or protect that class of homeless citizens whom it is our duty to protect, and who have spent their time and money to vindicate the law. I hope this bill will not pass until some provision is made to protect *bona fide* settlers as was done by the act of 1887, and when their rights conflict with the rights of purchasers from railroads to give to them a preference.

In your efforts to give quiet and repose to speculative purchasers do not destroy the legal and the equitable rights of those honest settlers who have been contesting and expecting to finally acquire homes on these lands.

Mr. Speaker, I have already said I do not believe there should be any statute of limitations against the Government which will prevent the unearthing and exposure of frauds. I am not afraid that the settlers of the country who have patents will be troubled by lawsuits. In the history of the Government, prior to 1891, I believe only 25 suits have been recommended by the Land Department against agricultural patents. There is no danger of any honest settlers being troubled with lawsuits on the part of the Government. What the Department wants, and what it ought to have, is the right to correct any errors in these lists if they contain mistakes and to purge them of all frauds; and let us not, because some of these lists were signed by that great and good man, Thomas A. Hendricks, say that we will not examine any of them. I was a little bit amused at my friend from Iowa [Mr. Hep-

burn] yesterday, when he talked so eloquently about the lamented Thomas A. Hendricks. During the lifetime of that illustrious man I do not suppose that my friend from Iowa was ever heard to say a kind word concerning him, but when he is dead, and the gentleman from Iowa is speaking for a class of persons who hold as purchasers under great railroad corporations, he would shelter them behind that grand and glorious name. I revere the memory of Hendricks. The first Presidential vote that I ever cast in my life was a ticket upon which his name appeared as a candidate for Vice-President of the United States. No purer and no better man ever lived within the borders of the United States. I wanted to see him President.

MR. HEPBURN: Will the gentleman permit an interruption?

MR. MCRAE: Certainly.

MR. HEPBURN: You seem to quarrel with me because I speak well of Mr. Hendricks after his death.

MR. MCRAE: No; I do not quarrel with you for speaking well of him even now.

MR. HEPBURN: It is the post-mortem virtues of Democracy that I usually applaud. [Laughter.]

MR. MCRAE: It is the improper use that you make of his good name and the outrageous purposes for which you would use it—perhaps unintentionally—to which I object. I challenge your right to use the good name of Thomas A. Hendricks, because he was once Commissioner of the General Land Office, to cover the mistakes or the frauds or the misconstructions, if you please, of these railroad certifications by which corporations and syndicates have secured millions of acres of land that they are not entitled to.

I deny that the statute of limitations which was passed in 1891 has been of any benefit to anyone. It passed without consideration. No one, so far as the record shows, knew of any such purpose. It was put in by a conference committee, and nobody except the conferees had any idea that there was any such provision in the bill. It did not belong there, and I think we should lose no time in repealing it to enable the Department and the courts to purge these railroad grants of fraud. When the 3d of March comes, if Congress does not act by repealing the whole statute of limitations or extending the time, you will find all these errors and frauds confirmed, and it will be done in the name of settlers. For ten years, upon this floor, I have tried in my humble way to reclaim some of the lands granted to railroad companies, and every time we have made an effort we have been met by just such eloquent vehemence as the gentleman from Iowa [MR. HEPBURN] can furnish, insisting that it will disturb the titles of some innocent purchasers. In every step that has been taken we have tried [**1936**] to protect purchasers and settlers, and yet with every step the railroads, in the name of their purchasers, have grown bolder and more determined until finally they procured a statute of limitations, and with only one-fourth of the grants examined a proposition is made to stop the investigations, and the cry comes for repose to them and their purchasers.

MR. LACEY was recognized, and yielded five minutes to Mr. Loud.

MR. LOUD: Mr. Speaker, the gentleman from Arkansas [Mr. McRae] has expended a great deal of force, aimed presumably at Spanish and Mexican

grants, but still his shaft has ultimately landed in the railroad camp. His remarks were directed presumably at the substitute amendment offered by myself, which simply eliminates from this bill the Spanish and Mexican grants and leaves intact the railroad and wagon grants. Now, let me say to the gentleman and to this House that there is not a Spanish or Mexican grant in this country which is not musty with the age of more than fifty years. There are no claims for Government lands pending upon any of these Spanish grants. We have been troubled in my State for a great many years, and we think the time has arrived, after more than half a century, when the *bona fide* settlers who have settled upon or who have purchased from these men who receive Mexican grants should be protected in the title which they today have. For argument's sake I would admit that every acre of the Mexican grants was stolen, but they have been recognized for fifty years, and I hope the good sense of this House will now confirm the titles in these lands.

MR. LACEY: I yield five minutes to my colleague [Mr. Hepburn].

MR. HEPBURN: Mr. Speaker, two days ago the gentleman from Arkansas [Mr. McRae] made a statement to the House that the certifications under which these lands were held were in the early days not regarded by the authorities as anything more than mere notice to the world that the railway companies claimed these lands. The gentleman made that statement in face of the fact that before the first one now in controversy was issued that a statute of the United States required the officers of the Government to issue these certificates and the law gave to them all of the effects of patents. They are patents; and the gentleman ought to

know it. For years he was chairman of the Committee on Public Lands and he must be familiar with the land system and the legislation; yet he made that statement here in the presence of this House.

I say that these lands are held under muniments of title as solemn as any that can be given by the Government of the United States, and the statement of the gentleman, lacking every feature of verity, was possibly made for the purpose of throwing some cloud or slur upon this class of cases. The gentleman says that he wants to unearth fraud. No man is proposing to throw a barrier in the way of such an inquiry. If he had read the amendment against which he declaims he would have seen that in that there was a provision whereby the Government can inquire into every case where a title had been secured through fraud or mistake. No one wants to throw an impediment in the way of such an inquiry. The gentleman was misleading when he said that the purpose of this bill was to secure inquiry in such matters. I make the statement to him now, and I challenge him to contradict it, that in all the investigations that have been made that have resulted in demands for reconveyance under the act of 1887 not one single instance can he find where fraud is alleged. In every instance the Department has simply urged that there was at a time an improper construction given to the statutes; that they now give another construction; and they want these suits to be brought to enforce a new construction that they now after more than twenty years, give to the statute.

Wherever there has been a demand for reconveyance that demand is for the reconveyance of lands that were patented under the rulings of the Depart-

ment as they then existed and as they were continued, not alone under the administration of Mr. Hendricks, but under the administration of gentlemen who have for many years, more than twenty years, administered the office of the Commissioner of the General Land Office and of the Interior Department. There was no variation in them for more than twenty years, and I want to state again to the House that the controversies are not with reference to fraud, that the controversies are not with reference to mistakes, but they are controversies growing out of changed rulings and new constructions that have been given by the Department in cases of this kind. That is the only subject of inquiry that the Department proposes to make, and they have not yet brought a suit or attempted to bring a suit which made claim for reconveyance except in cases where this was the only difficulty. Now, lately they have changed this ruling and changed their construction, and they want to bring suit because of new light that they claim to have had, and thus cloud and disturb titles held by settlers for almost a generation.

MR. LACEY: I now yield five minutes to my colleague on the committee [Mr. Bowers.]

MR. BOWERS: Mr. Speaker, this bill was under consideration by the Committee on Public Lands for over three weeks, occupying the time of every meeting of that committee. It came in there through a message of the President of the United States calling attention of Congress to the fact that the time would expire on the 3d of March when the United States, by its own action was debarred from commencing action against patentees where patents had been obtained through mistake, error, or through fraud. During the whole of

that time the members of the committee were occupied in satisfying themselves that the title of every *bona fide* purchase should be protected. There are three sections in the bill, and in each section that is provided for. Before the committee appeared the law officer of the Department, Mr. Hall, and his proposition was simply that the time be extended to commence suits against railroad patents. That is all. At the last meeting, when this bill was reported, the words "to include Spanish and Mexican grants of lands," at the last moment, was included. I will come to that in a minute. I want to say to the members of the House, if they will give me their attention a moment, that if they will look at the bill they will find that the *bona fide* purchaser, whoever he may be, is protected, no matter if the railroad grant was made in error, or if it was made under fraud, still the *bona fide* purchaser under that notice is protected; and the bill provides always that the recourse of the United States shall be against the patentee and not the purchaser.

Section 1 provides that—

"No patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title in such purchaser is hereby confirmed."

In section 3 it is provided that—

"No suit or action shall be brought to cancel or annul any patent or certification for said lands until such claim is investigated by the Department."

We have provided all through the bill for protecting the rights of *bona fide* purchasers. Now, a word as to this amendment. As has been truly said, most of these Spanish grants are from forty to fifty years old, and there has been fraud in the granting of some

of those patents: there is no question about that. But in the course of thirty, forty, or fifty years those lands have been settled, and whether the grants were fraudulent or not, this bill provides that every *bona fide* purchaser of those lands shall be confirmed in his possessions, and it is a very grave question, Mr. Speaker, whether we should reopen those cases. The Department has manifested no disposition to open up that field of inquiry. In fact, I may say that the representatives of the Interior Department have stated that in their opinion this bill protects every *bona fide* purchaser, and that the Department has no disposition to open up these cases except to investigate the various land grants made to railroads and wagon roads.

The reason they ask for this extension is that the amount of money they have had for making surveys and determining these matters has been insufficient, while the general business of the Department has not afforded them time to investigate these cases. For that reason they want a little more time to make the proper surveys and to prepare themselves fully in regard to these railroad and wagon-road grants. I can assure every member of the House that every lawyer on the committee (and I believe they are all lawyers but myself), together with the lawyers of the Interior Department, have agreed that this bill does provide for protecting every *bona fide* purchaser of lands, whether the original patent was issued in fraud or error or not.

Mr. Lacey: Mr. Speaker, I move the previous question on the committee amendment and the substitute offered by the gentleman from California [Mr. Loud].

The previous question was ordered.

MR. MCRAE: Mr. Speaker, I ask unanimous consent to have the amendment reported.

THE SPEAKER: The Clerk will report the committee amendment and also the substitute proposed by the gentleman from California.

The Clerk read first the committee amendment, as follows:

"Page 1, lines 4 and 5, after the word 'a,' insert 'railroad, Mexican, Spanish, or other.'"

The proposed substitute was then read, as follows:

"Strike out in line 5, page 1, the words 'special grant' and insert in lieu thereof the words 'railroad or wagon-road grant.'"

The question being taken, the substitute was agreed to by a vote of—ayes 73, noes 36.

The amendment as amended was then agreed to.

THE SPEAKER: The question now is on the second amendment of the committee.

The amendment was adopted.

THE SPEAKER: The question is upon the substitute proposed by the gentleman from Arkansas.

MR. LACEY: Mr. Speaker, there are some other amendments that members desire to offer to the bill.

MR. HEPBURN: Mr. Speaker, I desire to offer an amendment which I send to the desk. [1937]

The amendment was read, as follows:

"Add to the first section the following language:

"'*Provided*, That all lands patented or certified to any State, corporation, or individual, under the rulings or constructions of the law of the Commissioner of the General Land Office or the Secretary of the Interior, at the time of the issuance of said patents or certificates, and when no fraud has been committed by the agent of the State or corporation or by the individual,

shall be excepted from the operation of the provisions of this act as to extension of time and bringing of suits, and of the act approved March 3, 1887, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes."'"

MR. LACEY: Mr. Speaker, I move as a substitute for that proposed amendment the amendment which was read in my time yesterday.

The amendment of Mr. Lacey was read as follows:

"Add at the end of section 1: '*Provided*, That no suit shall be brought or maintained, nor shall recovery be had, for lands or the value thereof that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the sale or entry.'"

MR. LACEY: Now, Mr. Speaker, a word of explanation. My colleague [Mr. Hepburn] on yesterday explained that in Nebraska and in some other localities "lieu lands" had been patented in place of lands that the railroad companies had lost by reason of mistake in the Department in allowing settlement upon those lands. The amendment that I offer confirms the title to those lands that have been thus patented to railroad companies where they have lost other lands by reason of mistake committed in the Department. That will cover the point upon which my colleague based his argument yesterday.

MR. TAWNEY: May I ask the gentleman a question?

MR. LACEY: Yes, sir.

MR. TAWNEY: Your proposed substitute and the amendment of the gentleman from Iowa [Mr. Hepburn] relate solely to "lieu lands."

MR. LACEY : Certainly.

MR. TAWNEY : Now, the act of 1887 applies to lands that are known as "in place" lands as well as to "lieu lands."

MR. LACEY : Certainly.

MR. TAWNEY : Then why should we except lieu lands and still let the "place" and "indemnity" lands sold to *bona fide* purchasers remain under the provisions of the act of 1887 ?

MR. LACEY : We do nothing of the kind. The bill in express terms already protects the *bona fide* purchasers of all kinds of lands, "lieu lands," "place lands," or any other kind of lands.

MR. TAWNEY : It protects them at the end of a lawsuit.

MR. LACEY : Not at all.

MR. TAWNEY : It does not protect the bona fide purchaser so as to prevent a suit being brought by the Government against him and thus disturbing his title and the title to a great deal of land in the States where these suits are brought.

MR. LACEY : That may be. But so it is always with any person. A suit may be brought to attack the title of anybody. But when we frame a bill which perfects the title of these men, which says their title shall be confirmed, and is confirmed, and that if suit be brought it shall be the duty of the court to at once confirm the title, nothing more, certainly can be done.

But let me call the attention of the House and of my friend who wants light on this subject to the proposed amendment of my colleague, providing that when a patent has been issued, unless it has been issued by reason of fraud, that the title never can be assailed, although the railway company still remains

in possession. It is true that by reason of some mistake tracts of land here and there have been certified or patented to railway companies that ought never to have received them, and the bill as we have prepared it will enable the Government to reclaim or recover those lands within the next five years. But if the amendment proposed by my colleague [Mr. Hepburn] be adopted, that is the end of it. Unless you can show that the railway company was guilty of actual fraud, then, although the company may hold hundreds of thousands of acres that ought never to have been patented to it—lands which were patented to it by mistake—those lands can never be recovered. There is no reason why the railway companies should be thus protected and permitted to hold lands which do not properly belong to them. There is reason why the settler should be protected. Whether the land which he purchased from the railroad company actually belonged to it or not, the company had the muniments of title, it had the patent, was clothed with apparent authority to make the conveyance, and the settler has purchased the land, entered upon it, taken possession of it, and improved it. In such cases, no matter how defective the railroad company's title may have been, the settler should be protected.

But while the lands are still in the hands of the company I see no reason why we should be careful to protect their title, if the land was conveyed to them by mistake.

Mr. Tawney: The gentleman will concede, will he not, that when a railroad company has sold to *bona fide* purchasers, those purchasers ought to be protected by the Government?

Mr. Lacey: Certainly. Not only do I concede that,

but we have expressly provided in the bill that they shall be protected.

MR. TAWNEY: Now, when we know, as we do, that the greater part of the lands granted to the railroad companies have passed into the possession of *bona fide* purchasers, ought we not to take notice of that fact and protect them?

MR. LACEY: Certainly.

MR. TAWNEY: But ought we not to protect them against suits being brought by the Government to disturb their title?

MR. LACEY: I advise my friend to read the bill; he will find that such purchasers are protected by it.

MR. TAWNEY: Not against suits.

MR. LACEY: Let me ask the gentleman this question: Why should we give protection against suits and confirm the title in the remainder of the lands which the railroad company has not conveyed and which ought never to have been patented to it?

MR. TAWNEY: I am not in favor of that proposition. I have here a substitute for the amendment offered by the gentleman's colleague, and in my amendment it is provided expressly that the provisions of this act shall not apply to lands that are sold by a railroad company in good faith. This would leave the act applicable to all lands that are still held by the railroad company and which were granted by the General Government to the State for the benefit of the railroad company.

MR. LACEY: The last part of section 1 provides expressly that—

"No patents to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

Now, in order to protect settlers still further, so

that they might not even be required to go into court and make defense, the option has been given to them under sections 2 and 3 to simply file their statement with the Secretary of the Interior (if they want to avoid litigation), setting forth the fact that they are *bona fide* settlers; and then it is provided in express terms that no suit shall be brought in relation to those lands until the matter is first investigated in the Department; and if, after adjudication there, it is held that they are not *bona fide* settlers, that adjudication is not conclusive against them, but they can still make their further defense in the courts.

The committee has been very tender in behalf of these *bona fide* settlers and has endeavored to protect them, not only in the courts but out of the courts, and has provided means by which they may avoid going into the courts at all.

Mr. Speaker, I move the previous question on the amendment and the substitute.

MR. HEPBURN: I hope my colleague will not do that. I want to correct a misstatement which he has fallen into.

MR. LACEY: How much time does my colleague want?

MR. HEPBURN: Five minutes.

MR. LACEY: Very well; I withdraw the demand for the previous question and yield to the gentleman five minutes.

MR. HEPBURN: Mr. Speaker, the gentleman assures us that these suits will not be brought. Now, I know personally of an instance where, in the southern district of Iowa, the district attorney has been instructed to bring suit to recover some 25,000 acres of land. In order to bring any one of these suits, he says that it

will be necessary for him to make parties to the suit all of the inhabitants of the town of Hastings, in Mill County, Iowa. There will be nearly 1,000 defendants in that suit alone. They cannot recover without going through that process. It is true that no judgments will be rendered against any one of those persons by this fact, because they are *bona fide* holders; but they must appear in court and affirmatively show that fact. And my colleague ignores that condition of things entirely.

My colleague is in error again in another statement, The proposition I urged as an amendment to this bill does not do that which he says it will do. Whenever a mistake of fact has been made or a fraud perpetrated, actual or constructive, under my amendment suit may be brought. I only want to protect the settlers where there has been nothing of this sort, neither a mistake of facts nor a fraud of any kind. If fraud be found to exist, suits will be brought notwithstanding the adoption of my amendment. No lands are covered in the operation of this statute except, as I have said before, those issued under the rulings or construction of the Department, which has been continued from 1849 up to about 1875, twenty-five years or more of a continuous, uniform construction, which they are now seeking to overturn by later regulations or rulings.

I do not think, Mr. Speaker, that this is fair, and I do not think it is just to the people. My friend from Iowa says that suits could not be brought in many cases. I assert that every man living in the Eighth Congressional district of Iowa who owns lands that were conveyed under any one of these grants will have reason to fear a suit if this bill becomes a law.

He can not know what particular land the Secretary will select for the purpose of suits. Everyone will fear, and he will feel it incumbent on him to [1938] affirmatively show to the Secretary, in order to prevent action, that he is a *bona fide* holder. He will be put to that expense, and it will cost the people of my district tens of thousands of dollars to make this showing, and what I say of that district may be truthfully said of every district in the State of Iowa, in Nebraska, Missouri, Kansas, and in many parts of the State of Illinois.

Every Representative, Mr. Speaker, is interested, it seems to me, in behalf of his people in preventing this kind of litigation. If we adopt my amendment there will be no danger of that, and all the purposes the bill seeks to accomplish will still remain unimpaired.

MR. HOPKINS: Will the gentleman in charge of this bill yield for a question?

MR. LACEY: Certainly.

MR. HOPKINS: Will the gentleman from Iowa state in a word what objection there is to the adoption of the substitute offered by his colleague from Iowa?

MR. LACEY: It is very simple and only this: If the amendment be adopted we may as well kill the bill. There would not be enough left to swear by, although there might be enough to swear at. [Laughter.]

MR. HEPBURN: Will not every case of fraud be still open to investigation under the bill?

MR. LACEY: I was trying to answer my friend from Illinois. The amendment amounts to this: That no patent shall be hereafter cancelled or annulled in behalf of the United States by suit except in cases where actual fraud is shown.

Now, hundreds of thousands of acres of these lands, by reason of departmental mistakes in construction of the law, have been patented to the railroad and wagon companies that never should have been patented to them. If the land has been sold we confirm the title of the purchasers from the companies. But if it has not been sold there is no reason why the company should retain it. That is the only difference between my colleague and myself. His proposition that we shall only go behind the patents in case of actual fraud would nullify this bill and also the act of 1887, which requires that all these railroad grants should be re-examined and readjusted in the light of the decisions of the Supreme Court.

MR. HOPKINS: Now, just a further question. If I understand you correctly, if the amendment of your colleague is adopted it will confirm in the railroad and wagon-road companies all lands that they hold patents to that have been issued by mistakes in the Department?

MR. LACEY: Certainly; every acre of them. Now, that ought not to be done, either.

MR. HOPKINS: And that will take away all chance of upsetting these titles or again acquiring title to that property.

MR. LACEY: We should not pass this bill after putting that sort of an amendment in it which will confirm all these mistakes, because the number of fraudulent patents is not very great. I yield five minutes to the gentleman from Nebraska [Mr. Andrews].

MR. ANDREWS: Mr. Speaker, the pending amendment affects the title to about 201,000 acres of lieu lands in the State of Nebraska. If there should be any disturbance of the titles held upon those lands the whole

matter could be carried back to affect injuriously an equal amount of land in another portion of the State, and thus involve the interests of settlers on over 400,000 acres of land in the State of Nebraska. About 201,000 acres of land were accepted by a certain grantee, in lieu of other lands to which that grantee was entitled in the South Platte country. The lands accepted in the North Platte country, in the State of Nebraska, were, in some instances, less valuable than those in the South Platte country. Nevertheless, the grantee accepted these lieu lands rather than disturb the settlers who had filed homestead and other entries upon South Platte lands properly included in the grant to which I have referred.

MR. LACEY: May I ask the gentleman a question right there?

MR. ANDREWS: Certainly.

MR. LACEY: I should like to ask him whether he deems it important for the interests of this large number of settlers in the great tract of public lands in his district that this bill should go through, confirming these titles so as to protect them?

MR. ANDREWS: I do, Mr. Speaker, and I earnestly hope that the amendment proposed by the chairman of the committee will prevail. We have had an experience in Nebraska on a question like this, and I urge that no mistake be made in protecting our people from another experience so unsatisfactory to the settlers in the state of Nebraska. With this amendment, and another slight amendment that may be proposed later on, I earnestly hope that the bill may become a law. But, with the permission of the House, I desire to call attention to another important fact bearing upon this question.

The grant under consideration covers a period of about twenty-five years. Farmers have purchased lands under it and have invested the labor of almost a quarter of a century in the building of their homes.

If a period of ten years is sufficient to acquire title in other cases, why should not fifteen, twenty, or twenty-five years be sufficient for these pioneer farmers to secure absolute titles to their lands? Why should they be held in continued dread that they may be called into court to defend their titles?

They have earned their homes by the patient toil and struggles of years and should be given the absolute assurance that their titles will be confirmed without further delay.

MR. TAWNEY: I should like to ask the gentleman from Iowa if he has any objection to incorporating in this bill a provision that will throw upon the Government the burden of proving in the first instance whether or not the sale from the railroad company to the purchaser was made in good faith instead of putting the burden of proof of that fact, as the law of 1887 does, upon the purchaser in the first instance? The Government now proceeds upon the assumption that he is not a purchaser in good faith, and throws the burden of proof of ascertaining that fact upon the purchaser. I will ask the gentleman if he has any objection to a provision imposing upon the Government the burden of ascertaining as a condition precedent to its right to bring suit whether or not the settler is a *bona fide* purchaser? That will be a substantial protection to the actual, *bona fide* purchaser.

MR. LACEY: Why, certainly I have an objection to that. The law is very simple now, and if a *bona fide* purchaser is brought into court, he, above all persons

in the world, knows his own innocence, and if he c n not prove it—if he is afraid to go into court and prove it—it certainly is of a very doubtful character. Now, to have the presumption of innocence apply to all these cases would practically handicap the Government to the extent that it could never rectify any of these errors in patents.

MR. TAWNEY: The gentleman did not understand my question.

MR. LACEY: I understand it fully. You want to shift the burden of proof.

MR. TAWNEY: Only in cases where the land is certified erroneously; not where it is certified through fraud or misrepresentation. Only where the error has been committed by the officers of the Government, and because of that error the land has passed into the possession of an actual, *bona fide* purchaser.

MR. LACEY: This bill absolutely confirms the title to all that kind of land, and the assumption that the Government will bring suit where it knows it will fail, where the officers of the Government know the act of Congress has confirmed the title, is an assumption of something that I do not think we shall ever be faced with in the future. I do not think the suggestion ought to be put into this bill.

Mr. Speaker, I move the previous question upon the amendment and the substitute.

THE SPEAKER: Does the gentleman move the previous question upon the bill?

MR. LACEY: There will be perhaps one other item of the bill to consider before the previous question is moved upon the bill. I move it upon the amendment and the substitute.

MR. TAWNEY: If the previous question is ordered upon the amendment and the substitute, and if the substitute offered by the gentleman is voted down, will it be in order then to offer another substitute for the amendment offered by the gentleman from Iowa?

THE SPEAKER: It will.

The previous question was ordered.

THE SPEAKER: The previous question is ordered upon the amendment offered by the gentleman from Iowa [Mr. Hepburn] and the amendment offered by the chairman of the Committee on Public Lands.

MR. TAWNEY: That is the substitute.

THE SPEAKER: It is an amendment to the amendment. The question is on agreeing to the amendment to the amendment offered by the chairman of the Committee on Public Lands.

The amendment was agreed to.

THE SPEAKER: The question is on agreeing to the amendment as amended.

The amendment as amended was agreed to.

THE SPEAKER: Is there any other amendment?

MR. ANDREWS: I offer the amendment which I send to the Clerk's desk.

MR. LACEY: Has the amendment been agreed to?

THE SPEAKER: The amendment has been adopted as amended. The effect of it is the adoption of the amendment of the chairman of the Committee on Public Lands. The question now is on the amendment to the original proposition offered by the gentleman from Nebraska.

MR. ANDREWS: Mr. Speaker, this pertains to section 2. I misunderstood the section. I am not offering an amendment to section 1. My amendment relates to section 2.

THE SPEAKER: Is the proposition of the gentleman from Arkansas a substitute for the first section? [1939]

MR. LACEY: No, sir; it is a substitute for the entire bill, so that it will come up later on.

The Clerk read as follows:

"Amend by striking out all between the word 'be,' in line 9, and the word 'and,' in line 12 of section 2, and insert in lieu thereof 'more than the minimum Government price thereof.'"

MR. ANDREWS: Mr. Speaker, a moment's reflection will show that the terms of the bill would involve an inconsistency in some cases. For instance, $1.25 was the minimum Government price for certain lands which have been sold for less than that amount per acre. If the terms of the bill should go into effect, the maximum price in such cases would be 25 cents or 50 cents, while the minimum price would be $1.25. It would be very difficult to harmonize the provisions of the bill in practice if the wording should remain as it now stands. The amendment I have offered would, as a rule, require the grantee to pay to the Government the price at which he could have purchased the land from the Government in the open market.

Some of it may have been sold for more than the Government price, some of it for less. This amendment would leave the amount below the Government price, to be determined and adjudicated by the court. In my judgment, this plan would be far more reasonable than the one proposed by the terms of the bill.

THE SPEAKER *pro tempore* (MR. PAYNE): The question is on the amendment of the gentleman from Nebraska.

The amendment was agreed to.

MR. LACEY : Now, Mr. Speaker, I move the previous question upon the bill and the substitute offered by the gentleman from Arkansas.

The previous question was ordered.

THE SPEAKER *pro tempore* : The question is on the substitute offered by the gentleman from Arkansas.

The question was taken ; and the Speaker *pro tempore* announced that the noes seemed to have it.

MR. MCRAE : Division, Mr. Speaker.

The House divided ; and there were—ayes 42, noes 63.

MR. MCRAE : The yeas and nays.

The yeas and nays were ordered.

The question was taken ; and there were—yeas 72, nays 151, not voting 132.

So the substitute was rejected.

The bill was ordered to be engrossed and read a third time ; and being engrossed, it was accordingly read the third time, and passed.

On motion of Mr. Lacey, a motion to reconsider the vote by which the bill was passed was laid on the table.

The title of the bill was amended so as to read : " A bill to provide [1940] for the extension of the time within which suits may be brought to vacate or annul land patents, and for other purposes.

[2067] SENATE

MONDAY, *February 24, 1896.*

ANNULLMENT OF LAND PATENTS.

MR. DUBOIS : I am instructed by the Committee on Public Lands, to whom was referred the bill (H. R. 5474) to provide for the extension of the time within

which suits may be brought to vacate and annul land patents, and for other purposes, to report it favorably with amendments. I desire to make a brief statement regarding it.

Five years ago a bill was passed fixing the time within which the Government could bring suit against railroad companies to annul patents which had been issued fraudulently or erroneously. Unless the bill which I now report be passed by next Monday, all those fraudulent and erroneous patents will be validated. The bill has been amended in some respects by the Committee on Public Lands, and it must go to the House of Representatives, pass there, and be signed by the President by next Monday. The bill is of sufficient importance for the President to have sent a special message to Congress in regard to its subject-matter.

I will say that the Senate Committee on Public Lands, with a full attendance, every member being present save one, who is out of the city, have considered the bill carefully, and have come to an unanimous agreement. This is a unanimous report from the Committee on Public Lands, and I ask unanimous consent, owing to the emergency, that the bill may now be taken up and put on its passage. I think there will be no opposition to it.

MR. CALL: Temporarily laying aside the pending measure.

MR. DUBOIS: Of course, temporarily laying aside the pending measure.

By unanimous consent, the Senate, as in Committee of the Whole, proceeded to consider the bill.

The first amendment reported by the Committee on Public Lands was, in section 1, line 7, before the

word "years" strike out "ten" and insert "six"; so as to make the section read:

"That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon-road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of Section 8 of chapter 561 of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

The amendment was agreed to.

The next amendment was, in section 2, line 19, after the word "States," to insert "against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made"; and in line 22, after the word "party," to strike out "of" and insert "to"; so as to make the section read:

"SEC. 2. That if any person claiming to be a *bona fide* purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a

patent or certification, and if it shall appear that he is a *bona fide* purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the *bona fides* of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a *bona fide* purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a *bona fide* purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made, for the value of the land, as hereinbefore provided. Any *bona fide* purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such *bona fide* purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in sections 3 and 4 of chapter 376 of the acts of the second session of the Forty-ninth Congress."

The amendment was agreed to.

MR. HOAR: I should like to ask the chairman of the committee a question in regard to the last amendment at the foot of page 2. Suppose the land has been conveyed to a *bona fide* purchaser; then I

understand there is to be a judgment for the United States against the party who originally took the defective land grant, and has conveyed it to a *bona fide* purchaser; but the proposition is that there shall be a decree for the value of the land. Suppose some railroad company conveyed the land for $1.50 an acre at the time, or $2 an acre, or any other small sum, and this grant is held invalid by reason of some technical or other objection; the railroad company conveyed the land for that price, and now there is a city on it, and the land may have gone up twenty times in value; is it the purpose of the bill to hold the original patentee liable in that case for the present value of the land; and if so, is it not establishing a rule that exists nowhere else in regard to the liability of a grantor?

MR. PASCO: The minimum Government price is the amount fixed in the bill, as the Senator will see by looking at the tenth line of section 2.

MR. HOAR: In a previous section there is a limitation. That answers the question.

MR. PEFFER: I have received a number of letters in opposition to the bill, but not having examined its provisions, I did not quite see the force of the objections that were made. It was my impulse when the bill was read to object to its consideration, but after having conferred with a number of the members of the Committee on Public Lands, in whose judgment I have very great confidence, I have concluded not to raise the objection. However, I wish to make this statement in order that the objectors may understand that I have given the matter some consideration before letting the bill come to a vote.

MR. CALL: I should be glad to hear a statement made by some member of the Committee who is

familiar with the bill, which is a very important one. If it merely extends the limitation of time within which suits may be brought where lands have been fraudulently, erroneously and unlawfully conveyed to corporations, I have no objection to it. I shall vote for the bill, as I understand the matter, but reserving the right to move a reconsideration of the vote if I find that the sections are not of that character.

MR. BERRY: I will state to the Senator from Florida [Mr. Call] that in 1891 Congress passed an act requiring that all suits brought by the Government to annul patents should be brought within five years. That time will expire on the 3d day of the coming month, March. While the Land Office has done all that it has been possible to do to bring those suits within that time, it has been unable to bring all the suits that the officials believe should be brought, and the President of the United States called the attention of Congress to the matter, recommending that the law be repealed or at least the limit extended.

The other House has passed the pending bill. It sought in it to protect all innocent purchasers, *bona fide* purchasers, so as not to subject them to suits by the Government. The bill extends for five years the time within which the Government may bring suit to set aside any of the grants to the various railroad corporations of the country where the lands are still under the control or in the possession of the railroad company. That is the object and the purpose of the bill. There are a number of details by which innocent purchasers may apply to the Secretary of the Interior and have their titles confirmed where there is shown to be any question.

Now, I will state frankly that I should have pre-

ferred to repeal the act of 1891 out and out, and leave no question whatever. But that is impossible. This is a House bill, and it is this or nothing. If the pending bill is not passed and signed by the President before next Monday the limitation enacted in 1891 will have attached and it will be claimed, at least, whether it is the law or not, that the title, however fraudulent it may be, to the railroads will be confirmed. I think it is absolutely important that the bill should be passed and passed this evening, and so think all the other members of the Committee on Public Lands.

The bill was reported to the Senate as amended, and the amendments were concurred in. **[2068]**

The amendments were ordered to be engrossed, and the bill to be read a third time.

The bill was read the third time, and passed.

[2169] HOUSE OF REPRESENTATIVES

Wednesday, *February 26, 1896.*

ANNULMENT OF LAND PATENTS.

THE SPEAKER laid before the House a bill (H. R. 5474) to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes, with amendments of the Senate thereto.

The amendments were read.

THE SPEAKER: The question is on agreeing to the Senate amendments.

MR. MCRAE: Mr. Speaker, I object to the first amendment, and shall ask a separate vote upon it.

THE SPEAKER: The Clerk will report the amendment.

The amendment was read, as follows:

"Page 1, line 7, strike out 'ten' and insert 'six';

so as to make the clause read: 'Shall only be brought within six years of the date of issuance of such patent.'" [2170]

MR. MCRAE: Mr. Speaker, this bill as it passed the House contained very unusual provisions. It proceeds upon the theory that it is an extension of section 8 of the act of March 3, 1891, which provides as follows:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

Now, the first section of this bill as passed by the House—and passed in response to the special message of the President asking for legislation upon this subject—provides not for the extension of the statute which I have read, but it limits that statute to two kinds of patents, to wit, those based on railroad and wagon-road grants. The bill as passed by the House left the five years limitation as it was in the act of 1891, but changed the limitation for future patents "therein referred to," railroads and wagon roads, from six to ten years. Having refused to permit any corrections for fraud or mistake except as to railroad and wagon-road grants, we are now asked to limit the time as to these to only six years. I am perfectly satisfied, from the testimony before the committee during the consideration of this bill, that the grants which ought to be examined and adjusted cannot be properly examined within the time fixed by the Senate amendment. Indeed, I doubt whether the work can be done within the time fixed by the bill as it passed the House.

Therefore I am opposed to the change from ten to six years.

If this bill becomes a law it introduces into the Department and into the courts an entirely new proposition for consideration in adjusting and dealing with these land grants. By the act of March 3, 1891, Congress was content with a statutory limitation and trusted that act to give to the purchasers all of the rights that were granted them not in conflict with settlers. But here is a proposition to limit the right of investigation to two kinds of grants, and while it pretends to do this, at the same time it in effect proceeds to confirm them, for it provides that "no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title to such purchaser is hereby confirmed." This is done without regard to amount and without restriction as to the time of the purchase, and the good faith is not required to be shown beyond the holder of the land.

MR. MCMILLIN: Do I understand the gentleman from Arkansas to say that the Senate amendment, as now proposed to be concurred in, would not give the relief that was sought by the President and the Land Department and which was the special object of the bill proposed by the House?

MR. MCRAE: I think that would be the effect; at least it would so reduce the time allowed for the examination and adjustment of these grants as to make it practically impossible to do so with the present force allowed the Department.

This bill, I say, Mr. Speaker, would introduce a new subject of inquiry for the Department—that of investigating the claims of all persons who claim to be *bona fide* purchasers. The lands have been or

will be all sold by the railroads, and of course the purchasers will allege their own good faith, and under this bill nothing can be done until these questions are settled. With this additional duty upon the Department of the Interior time becomes important, and I venture to predict that all of the time that is prescribed by the Senate amendment will be taken up in the consideration of the claims of those persons who allege that they are *bona fide* purchasers from railroad companies, and the errors and frauds of the grants themselves will be practically untouched at the end of six years, thereby defeating the declared object of the bill; and under the mandatory terms of the bill the Department can not prevent it.

And so, Mr. Speaker, we find ourselves with a bill, the alleged object of which is to extend the time of the Department to adjust the grants, while at the same time it contains a declaration that they shall be confirmed by the affirmative action of the Department or by the judgment of the courts, if they elect to go into court; and so, instead of canceling the fraudulent patents, the effect of the bill, if the amendment be adopted, will be to confirm all of the land that may hereafter be, or that has been heretofore, sold to *bona fide* purchasers. It invites collusion and legalizes fraud of the worst character.

The bill may be a little better than nothing; but I think the principle we surrender in order to get it is worth a great deal more than all the land that will ever be recovered under its loose and dangerous provisions. In short, the bill when stripped of all verbiage helps no one except the purchasers of railroad lands, and it does this in utter disregard of the rights of the Government and of the settlers who claim under

the public-land laws. Perfect and complete immunity is given the railroads against suits for fraud and errors in patents for lieu lands by the proviso to the first section of the bill, and this is substantially all they want and all they ask.

Mr. Speaker, I can do nothing except to warn Congress of the danger of any such legislation. My colleague on the committee, the gentleman from Alabama [Mr. Underwood], and myself sought to do this when the bill was pending in the House, and now, as the majority is about making this dangerous and unusual experiment, I appeal to you to give the Department the longest time to investigate. According to the progress made during the last five years in the investigations of these grants it would take sixteen years to make the adjustments, unless the Committee on Appropriations shall see fit to increase the force of the General Land Office. I admit that we can not reach what in my judgment is the fatal defect of the bill by nonconcurring in the Senate amendment, but we can at least make an effort to secure for the Department and for the President, who are charged with the investigation of the grants, the time which the House has already voted to give for that purpose.

For my own part I do not believe that there ought to be any limitation against the Government, but if there is let it be a reasonable one, so that the work may be done correctly. If we pretend to do something, let us not at the same time so construct the bill as to prevent its accomplishment. No; you had better throw off all disguise and say to the railroads, take the grants, sell the lands, get what you can for them, without fear of investigation. That is what you have

done indirectly, and you furnish all the machinery for obtaining executive or judicial confirmation if thought necessary. The bill gives authority to the Department not to purge the grants of fraud, but to require it to stamp the seal of confirmation upon all of the lands that are held by *bona fide* purchasers, notwithstanding they may appear upon the records to be covered with fraud, although claimed by settlers under our land laws. The bill is in the interest of the railroads and not the settlers.

I hope the amendment will be nonconcurred in.

MR. LACEY: Mr. Speaker, I do not desire to follow my colleague upon the committee—

MR. BARNEY: I would ask the gentleman from Arkansas is there not great fear, unless we concur in the Senate amendment, that the statute of limitations will expire on the 3d of March next, and that therefore there is urgent necessity for our acting at once in this matter?

MR. MCRAE: I think there is no danger of defeating the bill, because if we nonconcur the bill will go into conference, which can be held to-day or to-morrow, and we can thereby make at least an honest effort to get the time fixed in the House bill.

MR. LACEY: Mr. Speaker, I do not wish to follow my colleague upon the committee in discussing the merits of the original proposition. Substantially the only thing that is now before the House is this proposition of the Senate to strike out "ten" and insert the word "six." In the existing law, the act of 1891, which has not been repealed, but which is still in full force, it is provided that all suits on patents theretofore issued shall be brought within five years from that time, and that on patents thereafter to be issued the time

shall be limited to six years. The House bill changed this time of six years to ten. The amendment of the Senate is to strike out the word "ten" in the House bill and adopt the original law of six years. Six years would then be the time in which the Government can hereafter assail a patent. That, it seems to me, is ample time. The Government officials will be more careful hereafter, with the experience they have had: and with the aid of the published adjudications of the Supreme Court they will be enabled with greater accuracy to adjust these patents, and hereafter the questions are not so likely to arise; but six years certainly will be ample to set aside all patents that may hereafter be assailed after being issued.

MR. MCMILLIN: Will the gentleman allow me to ask him a question?

MR. LACEY: Certainly.

MR. MCMILLIN: Do you concede the statement made by the gentleman from Arkansas, that the passage of this bill surrenders the rights of the Government to all except two classes of grants?

MR. LACEY: It does not surrender anything; it only makes an extension of time.

MR. MCMILLIN: Do you extend that to any except two?

MR. LACEY: The extension of time as recommended by the President in his message would have limited it to wagon-road grants and railroad grants, but the Senate has also included canal grants, there being also a small grant for that purpose involved. In the message of the President no statement was made as asking specifically for additional time with reference to patents to private individuals, such as desert-land claimants, homesteaders, and pre-empters, and the

whole object of the message seemed to be get unlimited time in which to assail the land-grant patents to railways and like patents; and this limitation is now extended by this bill five years longer, and the Senate says as to future patents six years instead of ten years, as the House bill provided, shall be the time.

MR. MCMILLIN: Will the gentleman permit me to ask him one more question?

MR. LACEY: Certainly.

MR. MCMILLIN: What is the objection to getting a conference on this bill, and trying, if you can, to get some of the relief that the gentleman from Arkansas insists ought to be obtained? [2171]

MR. LACEY: Because I do not want the relief asked by the gentleman from Arkansas.

MR. MCMILLIN: Then you are not in favor of the House bill?

MR. LACEY: I am opposed to the proposition of the gentleman from Arkansas.

MR. MCMILLIN: Do I understand the gentleman to say that he is not in favor of the House bill as it passed?

MR. LACEY: I voted for the House bill. My own preference, if I could have had it, would have been to change this bill so as to make it five instead of ten years, but the committee made it ten years. Yesterday the matter was laid before the committee and it agreed to the Senate amendment, with the exception of my friend and perhaps some others. At any rate, the majority of the committee were in favor of accepting the Senate amendment.

Now, Mr. Speaker, there is no necessity for extending the present limitation of six years to ten years as to future patents. The real contention be-

tween the gentleman from Arkansas and myself is this: He favors unlimited repeal of all limitation laws, so as to enable the Government in the future, at its will at any time, to file a bill to attack and to set aside any patent that may be issued of any kind, to a private individual, to a railway, or to a canal; on the other hand, the majority of the committee contend there ought to be a limit as to these things; and where land has been sold to outsiders, to an innocent purchaser, that their rights should be confirmed and that they should be relieved from litigation. That is the ground upon which we are divided. This mere question as to whether there should be ten years or six years in the future is not very important; and this bill must pass now substantially, if at all, because the limitation will expire next Monday, and if we go into a conference the chances are that this bill may be defeated.

MR. MCMILLIN: But the gentleman forgets that a conference report is privileged and can be presented at any time, and even supervenes a motion to adjourn.

MR. LACEY: Certainly; I understand that.

MR. MCMILLIN: And there is not the danger that the gentleman apprehends from allowing this matter to go over for the present.

MR. LACEY: If there were anything in the action of the Senate which I thought ought to be changed, I should ask a conference; but I think, on the contrary, if we were going to change the word "six" it ought to be made "five" instead of "ten."

MR. MCMILLIN: But is there not danger of the bill failing by your opposition to the House measure?

MR. LACEY: Not at all. I am not opposed to the

House bill. At the same time I did not regard every feature of that bill as perfect. For instance, the word "canal" has been inserted—a change which I think it well to make, as it appeared before the Senate committee that there was one canal grant which ought to be adjusted.

MR. NEILL: Do I understand the gentleman to say that he thinks there ought to be a statute of limitations as to fraud in favor of these railroad companies?

MR. LACEY: Not at all. There is a limitation now of so many years in which to adjust their grants.

MR. NEILL: Yes, sir.

MR. LACEY: Suit can be brought within five years. We are proposing to give five years more; and it is important to the gentleman's State and to other States that there should not be clouds cast upon the titles of patented lands, the great bulk of which have been heretofore sold and have passed into the hands of settlers. Even though there may have been actual fraud twenty, thirty, or forty years ago in reference to some of these grants, yet after patents have been issued there should be some limitation as to the time within which the Government should exercise activity and determine what patents, if any, are fraudulent or wrong, in order that suits may be brought, the facts determined, and facilities offered for settling up that country.

MR. NEILL: Mr. Speaker, will my colleague, chairman of the Committee on Public Lands, yield to a question? I desire to ask the gentleman if he thinks there should be any statute of limitations against the Government for the protection of titles acquired by frauds?

MR. LACEY: I think it is. I think five years enough. There are only 60,000,000 acres of unadjusted lands; 12,000,000 acres were adjusted last year. At that rate all these controversies can be adjusted inside of five years. But if five years should be found inadequate a further extension of one or two years might be granted by a supplemental act of Congress. But let me state to the gentleman from Arkansas that if we now give ten years the Interior Department will not touch this matter during the next five or six years; whereas if we now give only five years the work will be continued with the present activity. The Department has adjusted more grants of land during the last year (being the final year of the five already granted) than it adjusted within the previous three.

MR. NEILL: Mr. Speaker, the chairman of the committee [Mr. Lacey] has not convinced me, and I hope he has not convinced other members of the House, of the justness of his position. The railroad companies have had all the advantages in this matter. I know that such has been the fact in my State. Now we are asking something in behalf of the people, for whom the public lands should be held.

THE SPEAKER: The gentleman from Iowa [Mr. Lacey], as the Chair understands asks the previous question.

MR. LACEY: I withdraw the demand for a moment and yield five minutes to my colleague on the committee, the gentleman from Alabama [Mr. Underwood].

MR. UNDERWOOD: Mr. Speaker, I do not wish to detain the House with any lengthy discussion of this bill. When the bill originally came before the House

I opposed its passage in the form in which it now stands. I then gave my reasons why I thought it was better to have no limitation as to the forfeiture of these public lands where the patentees have obtained them by fraud or mistake. But the House saw fit to extend for a certain number of years the time within which forfeiture could be had rather than repeal the statute of limitations entirely. The bill went from this House fixing that limitation at ten years. It now comes back from the Senate with the limitation fixed at six years.

I consider there is every reason why the time should be extended as far as possible if we are going to have any limitation at all. I wish to call the attention to members of the House to the facts that were developed before the Public Lands Committee in the investigation had during the consideration of this bill. We then had before the committee the officers of the Public Land Department. They were examined as to the forfeiture of these public-land grants. It was disclosed in that investigation that there was in the Public Land Department but one set of books that could be inspected in the determination whether or not it was proper to forfeit these public-land grants, and it was developed that only a certain number of men could be employed in the examination of those books, so that necessarily the time for investigation must be extended or these men could not get at the facts and determine what grants had been acquired by fraud or mistake and what grants had been acquired properly.

Furthermore, on the investigation of the facts before the Public Lands Committee the officers of the Public Land Department in testifying before the committee stated that at the rate at which they had progressed in

the past, sixteen years more would be required to examine and inquire into these public-land grants. And with the testimony before the committee stating that it would take sixteen years to examine this question and determine whether the Government of the United States was going to be deprived of land that properly belonged to it, we had fixed in our original bill ten years for the forfeiture of grants in the future. Well, now, Mr. Speaker, if these officers, who are limited in their investigation to one set of books, whose numbers are necessarily limited, are held down to the investigation of the past grants, how in reason can they examine into the validity of the grants that are occurring now? You see that the cutting down of this time will absolutely deprive the Department of a full opportunity to investigate the rights of the Government of the United States and determine whether land is being taken away from it that properly belongs to the Government. For that reason I think the House should nonconcur in the Senate amendment, and we should insist on standing on the bill as it left the House and went to the Senate.

MR. MCMILLIN: Mr. Speaker, I would be obliged to the gentleman from Ohio [Mr. Lacey] if he would withhold his demand for the previous question for a moment.

MR. LACEY: How much time does the gentleman want?

MR. MCMILLIN: Only a few minutes.

MR. LACEY: I yield three minutes to the gentleman from Tennessee, and will give him more time if he needs it.

MR. MCMILLIN: Mr. Speaker, under the statement that has just been made by the gentleman

from Arkansas [Mr. McRae] and the gentleman from Alabama [Mr. Underwood], it strikes me there is only one decent way of doing this business, whatever we are going to do, and that is to let this matter go to conference, and let the conference committee report to this House the best they can do. There is no danger that this bill will be lost if there is any strenuous effort to save it. The time does not expire until next Monday. Conference reports take precedence of everything else and are about the only thing that can take precedence, even of a motion to adjourn. Only a few days ago the Committee on Public Lands brought into this House a proposition saying that ten years was short enough time for this limitation. The Commissioner of the Land Office estimated at that time that it would take sixteen years to do the work, and yet to-day we are called upon to surrender, not simply the six years between ten and sixteen, but to surrender four years of the time that the committee itself said we ought to have when they reported this bill. Now, if there have been frauds in connection with the disposition of these lands, they ought not to be covered up. There ought to be no legislation to condone those frauds, but every effort in behalf of the people should be made for the free, fair, and full investigation of the question.

For one I insist that no ill can come from letting this go to conference, and if gentlemen want to rush it through in hot haste, if they are determined to have legislation that shall benefit the [2172] people who have profited by these frauds, rather than benefit the people who are entitled to these lands, let the country know who is doing it. I do not believe this bill

should be rushed through, when the inevitable result will be to curtail the time for the Government to have justice done.

MR. LACEY: Mr. Speaker, I demand the previous question.

The question was taken; and the Speaker announced that the noes seemed to have it.

MR. LACEY: Division.

The House divided.

MR. MCMILLIN: We withdraw the demand, and will take the vote on the proposition itself.

THE SPEAKER: The Chair announced that the noes seemed to have it. The gentleman from Iowa [Mr. Lacey] demanded the division.

The House divided; and there were—ayes 120, noes none.

So the previous question was ordered.

THE SPEAKER: The question is on concurring in the first amendment.

The question was taken; and the Speaker announced that the noes seemed to have it.

MR. LACEY: Division.

The House divided; and there were—ayes 87, noes 43.

MR. MCRAE: Mr. Speaker, I demand the yeas and nays.

MR. LACY: I should be glad to have this amendment reported. I think perhaps there is some misapprehension as to the amendment before the House.

THE SPEAKER: The gentleman asks unanimous consent that his amendment be reported again. Is there objection?

There was no objection.

The Clerk read as follows:

"Page 1, line 7, strike out 'ten' and insert 'six'."

THE SPEAKER: The gentleman from Tennessee demands the yeas and nays.

MR. MCMILLIN: The gentleman from Arkansas [Mr. McRae] demands the yeas and nays.

The question was taken; and there were—yeas 156, nays 93, not voting, 106.

So the amendment was concurred in.

The remaining Senate amendments were then concurred in.

On motion of Mr. Lacey, a motion to reconsider the vote by which the Senate amendments were concurred in was laid on the table.